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In The

Supreme Court of the United States

GENEVIEVE DICENZO, Executrix of the
Estate of Joseph DiCenzo, and
Genevieve DiCenzo, in her own right,

Petitioner,

vs.

GEORGE V. HAMILTON, INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio**

PETITION FOR WRIT OF CERTIORARI

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January 21, 2009

QUESTION PRESENTED

Whether the selectively prospective application of a new state common law rule violates the Equal Protection clause of the United States Constitution?

PARTIES TO PROCEEDING BELOW

Genevieve DiCenzo, Executrix of the Estate
of Joseph DiCenzo, and Genevieve DiCenzo,
in her own right, Appellee, vs. George V.
Hamilton, Inc., Appellant.

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OPINIONS BELOW

The Opinion entered October 22, 2008 by the Supreme Court of Ohio (reproduced at App. 1) is reported at 120 Ohio St.3d 149, 897 N.E.2d 132. The Opinion entered June 28, 2007 by the Court of Appeals for the Eighth District of Ohio (reproduced at App. 37) is unreported and available on Westlaw at 2007 WL 1976735. The Opinion entered May 9, 2006 by the Court of Common Pleas of Cuyahoga County, Ohio (reproduced at App. 59) is not reported.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was entered by the Supreme Court of Ohio on October 22, 2008. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio pursuant to 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1977, the Supreme Court of Ohio adopted § 402A of the Restatement (Second) of Torts in *Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977), and analyzed the liability of a non-manufacturing supplier of asbestos-containing products under that framework. Although the supplier in *Temple* was determined not to be strictly liable, the Supreme Court of Ohio clearly applied the principles of § 402A in reaching its determination. Noting that “[u]nder Section 402A, . . . a plaintiff must prove that the product was defective at the time it left the seller’s hands[.]” *id.*, 364 N.E.2d at 271, the court declined to find that either the manufacturer or the seller could be held strictly liable since the injury-causing press had undergone substantial change after leaving their hands. *Id.*, 364 N.E.2d at 272.

Ohio case law has long dictated that judicial opinions adopting a new rule of law are to be given retroactive application. See *Lakeside Ave. L.P. v. Cuyahoga County Board of Revision*, 707 N.E.2d 472, 475 (Ohio 1999); *Peerless Electric Co. v. Bowers*, 129 N.E.2d 467, 468 (Ohio 1955). Accordingly, at least four Ohio appellate courts applied the *Temple* rule in analyzing a strict liability claim against a supplier either asserted prior to the *Temple* decision or based on tortious conduct occurring prior to the *Temple* decision. See *Silvillo v. Dreis & Krump Manufacturing Co.*, Nos. 50430, 50469 and 50522, 1986 WL 6114 (Ohio Ct.App. May 29, 1986); *Hodory v. Federated Department Stores, Inc.*, No. C-780635, 1979 WL 208781 (Ohio Ct.App. December 26, 1979); *Kranz v. Benjamin & Medwin, Inc.*, C.A. No. L-78-232, 1979

WL 207244 (Ohio Ct.App. September 28, 1979); *Kinstle v. J&M Manufacturing Co.*, Case No. 8-76-6, 1977 WL 199565 (Ohio Ct.App. August 26, 1977). Indeed, over the ensuing three decades, courts and litigants applied § 402A to non-manufacturing suppliers in countless asbestos cases on the strength of *Temple*. See *DiCenzo v. A-Best Products Company, Inc., et al.*, 897 N.E.2d 132, 164 (Ohio 2008) (Reproduced at App. 35) (Pfeifer, J., dissenting) (“[W]hat of the thousands of cases already tried or settled involving asbestos suppliers? Is there equity in holding the suppliers in those cases to a different standard than the suppliers who will benefit from this case?”).

In 1999, Petitioner’s decedent, Joseph DiCenzo, was diagnosed with pleural mesothelioma, a cancer of the lining of the lung the only known cause of which is exposure to asbestos. Mr. DiCenzo died of mesothelioma on February 22, 2000 at age 66. On March 23, 2000, Mrs. DiCenzo filed suit in the Court of Common Pleas of Cuyahoga County, Ohio, against Respondent George V. Hamilton, Inc. (“G.V. Hamilton”) and other entities, alleging damages arising from her husband’s exposure to asbestos-containing products during the course of his employment.

The trial court granted summary judgment for G.V. Hamilton on June 27, 2006 (App. 55), after holding that the Supreme Court of Ohio’s adoption of strict liability for suppliers pursuant to Restatement (Second) of Torts § 402A in *Temple* may not be applied retroactively to cases arising from exposure to asbestos-containing products supplied prior to the *Temple* decision. In so holding, the trial court applied the 3-factor test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97

(1971), notwithstanding black-letter Ohio Supreme Court law that if the judicial decision is not expressly prospective, it is to be applied retrospectively.

Following the entry of a Final Order and Judgment by the trial court on July 17, 2006 (App.64), Petitioner filed a Notice of Appeal to the Court of Appeals for the Eighth District of Ohio. The Court of Appeals for the Eighth District of Ohio reversed the trial court's ruling that *Temple* could not be retroactively applied for the supply of asbestos-containing products occurring prior to 1977 and held, following its own analysis of the *Chevron* factors, that "*Temple* applies retroactively to suppliers, like Hamilton, who may have supplied asbestos products before the *Temple* case was decided." App. 52. G.V. Hamilton filed a Notice of Appeal to the Supreme Court of Ohio on August 29, 2007. The Supreme Court of Ohio accepted jurisdiction on December 26, 2007. In her Merit Brief of Appellee Genevieve DiCenzo ("Merit Brief"), Petitioner argued that

strict liability has already been applied retroactively by this Court. In nearly every case, a newly adopted rule will apply to the parties before the court. Thus, the new rule has retroactive effect and remaining consistent in a rule's application is essential to avoid disparate results and serious equal protection concerns.

App. 66. On October 22, 2008, the Supreme Court of Ohio reversed the decision of the Court of Appeals for the Eighth District of Ohio. Although

the court acknowledged that *Chevron* was overruled by this Court in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), it found that the overruling applied to issues of federal law only and held, after applying the *Chevron* factors, that the 1977 *Temple* decision required prospective application only. The Supreme Court of Ohio did not address the federal constitutional question of equal protection raised in Petitioner's Merit Brief.

ARGUMENT

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), this Court evoked considerations of equal protection when it held that selective prospectivity may not be applied to civil holdings because it results in the dissimilar treatment of similarly situated litigants:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith* [*v. Kentucky*, 107 S.Ct. 708 (1987)]'s ban against 'selective application of new rules.' Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law to shift and spring' according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule. Our approach to retroactivity heeds the admonition that 'the Court has no more constitutional authority in civil cases

than in criminal cases to disregard current law or to treat similarly situated litigants differently.'

Harper, 509 U.S. at 97 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991); other citations omitted).

The reasoning of *Harper* invokes constitutional considerations of the equal protection of the law, a principle applicable to all constitutionally created courts. Because this Court had no occasion in *Harper* to consider whether such invocations extended to the decisions of state courts regarding the selectively prospective application of new rules of state law, state courts are faced with the issue of whether to continue to apply the 3-factor test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), in light of the *Harper* decision. In its opinion in the instant action, the Supreme Court of Ohio determined that "*Harper's* limitation of *Chevron Oil* applies to federal law only. . . . [and] *Chevron Oil* remains viable for purposes of analyzing state law[.]" App. 17-18. The court's dismissive treatment of *Harper* reflects a belief echoed by other state courts that *Harper* did not have constitutional significance and thus is not binding on their decisions regarding the retroactivity of new state rules announced in judicial decisions.

While this Court, in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), held that state courts have the authority to determine whether their decisions will have solely prospective application, this Court's opinion in *Sunburst* did not address the equal protection concerns implicated in a state court's application of

a new rule of state law to the litigants before them but not to other cases where the conduct to be considered occurred prior to the adoption of the new rule. Petitioner submits that this issue is important for the Court's consideration because there are state courts, now including the Supreme Court of Ohio, holding – and in the course thereof avoiding considerations of equal protection – that *Harper's* express limitation to applications of federal law leaves them free to apply new rules of state law with selective prospectivity. Petitioner further submits that the *Harper* decision should be found to be of constitutional import under the equal protection clause and its holding applied to the states. *Cf. Partial Retroactivity: A Question of Equal Protection*, 43 TEMP.L.Q. 239, 249 (1969-1970) (“when the Court simply picks and chooses, from among similarly situated defendants, the fundamental guarantee of equal protection is denied to those not fortunate enough to be chosen.”).

A number of state courts have addressed the issue of whether *Harper* impacts their application of new rules of state law, yet ultimately determined that consideration of the *Chevron* factors remains permissible, leaving selective prospectivity a viable option for the application of new rules of state law, without regard to their prior application to the litigants to the case at bar. *See Findley v. Findley*, 629 S.E.2d 222, 228 (Ga. 2006) (determining that “the juristic philosophy of this State is more consistent with that expressed in” *Chevron* than in *Harper* or *Beam*, and concluding that it would apply a general rule of retroactivity for a judicial decision announcing a new rule unless the decision states otherwise, unless consideration of the

Chevron factors was warranted); *Dempsey v. AllState Insurance Company*, 104 P.3d 483, 488-89 (Mont. 2004) (determining that satisfaction of all three factors of the *Chevron* test could invoke a prospective application exception to a general rule of retroactivity); *In re Commitment of Thiel*, 625 N.W.2d 321, 327 n.6 (Wis. 2001), *review denied*, *State v. Thiel*, 630 N.W.2d 219 (Wis. 2001) (employing the *Chevron* test in a determination of retroactivity for an earlier decision, in part because of an earlier analysis by the Wisconsin Supreme Court that “*Harper* only applies to the interpretation of federal law by the United States Supreme Court”); *Aleckson v. Village of Round Lake Park*, 679 N.E.2d 1224, 1227 (Ill. 1997) (deciding that *Harper* had no application to decisions of state courts regarding their state laws); *Beavers v. Johnson Controls World Services*, 881 P.2d 1376, 1383 (N.M. 1994) (concluding that a presumption of retroactivity could be overcome by an analysis of the *Chevron* factors); *City of New Bern v. New Bern-Craven County Board of Education*, 450 S.E.2d 735, 743 (N.C. 1994) (rejecting the reasoning of *Harper* because the issue before the court involved one of state constitutional law). These courts have either disregarded the equal protection issue manifest in the selectively prospective application of new rules of state law, or, like the Supreme Court of New Mexico in *Beavers*, have recognized the issue and chose not to address it. Indeed, the *Beavers* court suggested that “[t]he possibility that selective prospectivity might deprive parties in a subsequent case of equal protection of the laws raises an interesting question”, but declined to address the issue because it was not one presented by the parties. *Beavers*,

881 P.2d at 1382 n.8. *See also Sunich v. Chicago and North Western Transportation Company*, 478 N.E.2d 1362, 1365 (Ill. 1985) (in a pre-*Harper* opinion, the court rejected an equal protection challenge to the selectively prospective application of a prior opinion, concluding that the parties to the case adopting the new rule were entitled to its benefit, but that it should otherwise be applied prospectively).

On the other hand, certain state courts have addressed *Harper* and concluded that its reasoning is equally relevant to their determination of the retroactive or prospective effect of judicial decisions announcing new rules of state law. *See Christy v. Cranberry Volunteer Ambulance Corps., Inc.*, 856 A.2d 43, 51-52 (Pa. 2004) ("the decision of the Supreme Court in *Harper* further strengthens the general principle that changes in law are to be applied retroactively to pending cases"); *Estate of Ireland v. Worcester Insurance Company*, 826 A.2d 577, 581 (N.H. 2003) (rejecting selective civil prospectivity and holding that once a new rule has been applied retroactively to the parties before the court, it must be given uniform retroactive application); *State v. Styles*, 693 A.2d 734, 735 (Vt. 1997) (acknowledging *Harper* as consistent with its view of retroactivity). *See also Robinson v. City of Seattle*, 830 P.2d 318, 343 (Wash. 1992), *cert. denied*, *City of Seattle v. Robinson* and *Robinson v. City of Seattle*, 506 U.S. 1028 (1992) (relying on *Beam Distilling* in its holding of "the abolishment of selective prospectivity in the application of our state appellate decisions").

In the present case, Ohio has weighed in on the side of those states holding that a rule may be limited to prospective application without regard to

its retrospective application to the parties before the court. Indeed, this Ohio decision goes even further in its disregard for equal protection concerns, by limiting *Temple's* application some 30 years after the fact, when the "new" rule had already been applied to thousands of litigants in the same circumstances as Mrs. DiCenzo.

Petitioner submits that the issue of whether the equal protection clause restricts states' freedom to make selectively prospective applications of new rules of state law under the equal protection clause is an important question that this Court should address because many state courts that have considered the issue of selective prospectivity, including the Supreme Court of Ohio, have determined that *Harper* allows them to make selectively prospective applications of new rules of state law without regard to the equal protection rights of similarly situated litigants. As a member of this Court wrote in his concurring opinion in *Harper*:

Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. . . . The true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice. . . . Indeed, the roots of the contrary tradition are so deep that Justice Holmes was prepared to hazard the guess that 'judicial decisions have had retrospective operation for near a thousand years.'

Id., 509 U.S. at 105-06 (Scalia, J., concurring) (emphasis in original) (quoting *Kuhn v. Fairmont*

Coal Co., 215 U.S. 349 (1910) (Holmes, J., dissenting). It is Petitioner's position that allowing state courts to engage in selective prospectivity in the application of judicial decisions announcing new rules of state law will constitute an implicit endorsement of the very judicial activism that this Court spurned in *Harper* and violate the rights of similarly situated litigants to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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App. 1

897 N.E.2d 132

Supreme Court of Ohio.
DiCENZO et al., Appellees,
v.
A-BEST PRODUCTS COMPANY, INC. et al.,
Appellants.
No. 2007-1628.

Submitted June 4, 2008.
Decided Oct. 22, 2008.

SYLLABUS OF THE COURT

1. An Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision. (*Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, followed.)

2. An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result. (*Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, adopted and applied.)

App. 2

Goldberg, Persky & White, P.C., Joseph J. Ciri-
lano, Mark C. Meyer, David B. Rodes, Diana Nick-
erson Jacobs, and Jason T. Shipp, for appellees.

Willman & Arnold, L.L.P., and Ruth A. Antinone,
for appellant George V. Hamilton, Inc.

Shook, Hardy, & Bacon, L.L.P., Victor E.
Schwartz, Cary Silverman, and Mark A. Behrens,
urging reversal for amici curiae Coalition for Litiga-
tion Justice Inc.; National Federation of Independent
Business Legal Foundation; National Association of
Wholesaler-Distributors; Chamber of Commerce of
the United States of America; American Insurance
Association; National Association of Mutual Insur-
ance Companies; Property Casualty Insurers Associa-
tion of America; and American Chemistry Council in
support of appellant.

Ulmer & Berne, L.L.P., Bruce P. Mandel, Marvin
L. Karp, and Max W. Thomas, Cleveland, urging
reversal for amici curiae, Ceecorp, Inc.; Cleveland
Oak, Inc.; Fisher Scientific Co., L.L.C.; The Edward
Hart Co.; McMaster-Carr Supply Co.; P.C. Campana,
Inc.; and Standard Glove & Safety Equipment Co.

Bonezzi, Switzer, Murphy, Polito & Hupp Co.,
L.P.A., William D. Bonezzi, Kevin O. Kadlec, Joseph
T. Ostrowski, and Keith Hansbrough, Cleveland,
urging reversal for amici curiae Donald McKay
Smith, Inc.; F.B. Wright Co. of Cincinnati; Hersh
Center Packing Co.; M.F. Murdock Co.; MVS Co., Inc.;
and Yohe Supply Co.

App. 3

Kelley, Jasons, McGowan, Spinelli & Hanna, L.L.P., and John A. Kristan Jr., Cleveland, urging reversal for amicus curiae Red Seal Electric Co.

Weston Hurd L.L.P. and Jennifer Riester, Cleveland, urging reversal for amici curiae Akron Gasket & Packing Enterprise, Inc.; Fidelity Builders Supply; and Graybar Electric Co., Inc.

Mansour, Gavin, Gerlack, & Manos Co., L.P.A., Samuel R. Martillotta, and Edward O. Patton, Cleveland, urging reversal for amicus curiae F.B. Wright Co.

Gallagher Sharp and Daniel J. Michalec, Cleveland, urging reversal for amicus curiae Glidden Co.

McMahon DeGulis, L.L.P., and Stephen H. Daniels, Cleveland, urging reversal for amici curiae Advance Auto Parts, Inc. and Sears Roebuck and Co.

Dickie, McCamey & Chilcote, P.C., Richard C. Polley, and Piero P. Cozza, Steubenville, urging reversal for amicus curiae Frank W. Schaefer, Inc.

Zimmer Kunz, P.L.L.C., Jeffery A. Ramaley, and Joni Mangino, urging reversal for amicus curiae Nitro Industrial Coverings, Inc.

Davis & Young, C. Richard McDonald, and Jennifer Sardina Carlozzi, Cleveland, urging reversal for amici curiae Asbeka Industries of Ohio; Hill Building Supply, Inc.; and Nock Refractories Co., Inc.

App. 4

Squire, Sanders & Dempsey, L.L.P., and Laura Kingsley Hong, Cleveland, urging reversal for amicus curiae Applied Industrial Technologies, Inc.

Reminger & Reminger Co., L.P.A., and Thomas R. Wolf, Cleveland, urging reversal for amicus curiae Ohio Pipe & Supply Inc.

Wayman, Irvin & McAuley, L.L.C., and Dale K. Forsythe, urging reversal for amicus curiae Gateway Industrial Supply.

Oldham & Dowling and Reginald S. Kramer, Akron, urging reversal for amicus curiae Fairmont Supply Co.

Roetzel & Andress, Susan Squire Box, and Brad A. Rimmel, Akron, urging reversal for amicus curiae C.F. Hall Co.

Swartz Campbell, L.L.C., and Kenneth F. Krawczak, Cleveland, urging reversal for amicus curiae Mau-Sherwood Supply Co.

Grogan Graffam, P.C., and Leo Gerard Daly, urging reversal for amicus curiae F.B. Wright Co. of Pittsburgh.

McLaughlin & McCaffery, L.L.P., and Dennis P. Zapka, Cleveland, urging reversal for amicus curiae R.E. Kramig & Co., Inc.

Baker & Hostettler, L.L.P., and Wade A. Mitchell, Cleveland, urging reversal for amicus curiae McGraw Construction Co, Inc.

App. 5

Bricker & Eckler, L.L.P., Kurtis A. Tunnell, and Anne Marie Sferra, Columbus, urging reversal for amicus curiae Ohio Alliance for Civil Justice.

Karen R. Harned and Elizabeth A. Gaudio, urging reversal for amicus curiae National Federation of Independent Business Legal Foundation.

Keeley, Kuenn and Reid and George W. Keeley, urging reversal for amicus curiae National Association of Wholesale-Distributors.

Robin S. Conrad and Amar D. Sarwal, urging reversal for amicus curiae National Chamber Litigation Center, Inc.

Lynda S. Mounts and Kenneth A. Stoller, urging reversal for amicus curiae American Insurance Association.

Ann W. Spragans and Sean McMurrough, urging reversal for amicus curiae Property Casualty Insurers Association of America.

Greg Dykstra, urging reversal for amicus curiae National Association of Mutual Insurance Companies.

Donald D. Evans, urging reversal for amicus curiae American Chemistry Council.

LUNDBERG STRATTON, J.

I. Introduction

{¶ 1} In this case, we must determine whether our decision in *Temple v. Wean United, Inc.* (1977), 50

Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, which imposed strict liability on nonmanufacturing sellers of defective products, applies retroactively to products sold before *Temple* was announced in 1977. Applying the three-part test in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296, we hold that *Temple* applies prospectively only. Accordingly, we reverse the judgment of the court of appeals.

II. Facts

{¶ 2} From the 1950s until 1993, Joseph DiCenzo was employed at the Wheeling-Pittsburgh Steel Corporation. DiCenzo held various positions during his employment at the mill, including tin-line laborer, tractor operator, piler, welding-machine operator, and tin-line operator. During this employment, DiCenzo was exposed to products that contained asbestos. Appellant George V. Hamilton, Inc. ("Hamilton") supplied insulation products that contained asbestos to the mill during DiCenzo's employment there. Hamilton did not manufacture these products. In 1999, DiCenzo experienced pleural effusion, and in the fall, doctors diagnosed DiCenzo with mesothelioma. Approximately three months later, he died.

{¶ 3} DiCenzo's wife, Genevieve DiCenzo, along with other plaintiffs, filed suit against approximately 90 defendants, including Hamilton, alleging strict

liability, defective design, and failure to warn; negligent failure to warn; breach of warranty; conspiracy, concert of action, and common enterprise; alternative liability; and market-share liability.

{¶ 4} Hamilton filed a motion for summary judgment alleging that it was not strictly liable for supplying asbestos products prior to 1977 because *Temple v. Wean*, 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, which in 1977 held nonmanufacturing suppliers liable for defective products, does not apply retroactively. The three-judge panel unanimously granted summary judgment to Hamilton on the strict-liability claim.

{¶ 5} The court of appeals applied the test in *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296, but held that *Temple* did not satisfy the criteria that support prospective-only application on the strict-liability claim. *DiCenzo v. A-Best Prods. Co., Inc.*, Cuyahoga App. No. 88583, 2007-Ohio-3270, 2007 WL 1976735, ¶ 30. Therefore, the court of appeals held, *Temple* applied retrospectively. *Id.* The court of appeals remanded the cause for further proceedings on DiCenzo's strict-liability claims against Hamilton. *Id.* at ¶ 31.

{¶ 6} This cause is now before us pursuant to our acceptance of Hamilton's discretionary appeal. *DiCenzo v. A-Best Prods. Co., Inc.*, 116 Ohio St.3d 1455, 2007-Ohio-6803, 878 N.E.2d 33.

{¶ 7} Hamilton argues that under *Chevron Oil, Temple* should receive prospective-only application. DiCenzo makes three arguments in response: (1) the general rule is that judicial decisions are applied retrospectively absent language indicating otherwise, and because *Temple* did not specify that it applies only prospectively, it applies retrospectively; (2) *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74, overruled *Chevron Oil*, and *Harper* requires retrospective application of all civil decisions; and (3) notwithstanding the test in *Chevron Oil*, *Temple* should be applied retrospectively.

III. Analysis

A. *Chevron Oil Co. v. Huson*

{¶ 8} Because *Chevron Oil* is central to the dispute before this court, we begin our analysis by examining its holding. In *Chevron Oil*, Huson filed a lawsuit in January 1968 against Chevron for injuries that he received while working on its drilling rig in December 1965. *Chevron Oil Co. v. Huson*, 404 U.S. at 98, 92 S.Ct. 349, 30 L.Ed.2d 296. When Huson filed his lawsuit, it was thought that admiralty law, not state law, applied and that the admiralty doctrine of laches determined the statute of limitations. *Id.* at 99, 92 S.Ct. 349, 30 L.Ed.2d 296. Chevron did not question the timeliness of Huson's complaint. *Id.*

{¶ 9} While respondent's case was pending, however, the court decided *Rodrigue v. Aetna Cas. &*

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Sur. Co. (1969), 395 U.S. 352, 366, 89 S.Ct. 1835, 23 L.Ed.2d 360, which held that state law applied to claims for personal injury on oil rigs. Relying on *Rodrigue*, the District Court in *Chevron Oil* held that the respondent's claim was barred by Louisiana's one-year statute of limitations. The court of appeals reversed. *Huson v. Chevron Oil Co.* (C.A.5, 1970), 430 F.2d 27.

(¶ 10) On appeal to the Supreme Court, Huson argued that *Rodrigue* should apply only prospectively. The court held that the answers to three questions determine whether a decision should apply prospectively only: (1) does the decision establish a new principle of law that was not clearly foreshadowed? (2) does retroactive application of the decision promote or hinder the purpose behind the decision? and (3) does retroactive application of the decision cause an inequitable result? *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296. After examining these questions, the court concluded that (1) applying the Louisiana statute of limitations to a federal admiralty law was a case of first impression that was not foreshadowed; (2) applying the one-year statute of limitations would deprive respondent of any remedy whatsoever, a result inconsistent with the purpose of affording employees comprehensive remedies; and finally, (3) applying the one-year statute of limitations to respondent's complaint would have been inequitable because at the time, he did not know that the one-year limitation would apply to his case. Thus, *Chevron Oil* held that *Rodrigue* applied only

prospectively to Huson and therefore did not time-bar Huson's complaint. *Id.*

B. This Court's Decisions Addressing Retroactive/Prospective Application of Court Decisions

{¶ 11} We now examine Ohio law addressing prospective/retroactive application of court decisions. In *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, this court held, "The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it was never the law." *Id.* at 209, 57 O.O. 411, 129 N.E.2d 467. See also *Deskins v. Young* (1986), 26 Ohio St.3d 8, 10-11, 26 OBR 7, 496 N.E.2d 897. However, we also recognized two exceptions to the general rule, which occur when "contractual rights have arisen" or when "vested rights have been acquired under the prior decision," and in these situations, the decision would be applied only prospectively. *Peerless* at 209, 57 O.O. 411, 129 N.E.2d 467. See also *Gooding v. Natl. Union Fire Ins. Co. of Pittsburgh*, Stark App. No. 2003CA00209, 2004-Ohio-694, 2004 WL 292068, ¶ 22, 27.

{¶ 12} "However, blind application of the *Peerless* doctrine has never been mandated by this court." *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 290, 699 N.E.2d 507, citing *Roberts v.*

United States Fid. & Guar. Co. (1996), 75 Ohio St.3d 630, 633, 665 N.E.2d 664. “Consistent with what has been termed the *Sunburst* Doctrine, state courts have * * * recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.’”¹ (Ellipsis sic.) *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 30, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, 19 OBR 1, 482 N.E.2d 575, (Douglas, J., concurring). See also *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388. In *Minster*, the court “establish[ed] the proper method for implementing interest rates exceeding the statutory maximum on a book account pursuant to R.C. 1343.03(A),” but the court declined to apply the decision retroactively because the court did not want to “create shock waves throughout the many sectors of Ohio’s economy that rely on book accounts to do business.” *Minster* at ¶ 30.

{¶ 13} We have also stated that “[c]onsideration should be given to the purpose of the new rule or standard and to whether a remand is necessary to effectuate that purpose.” *Wagner*, 83 Ohio St.3d at 290, 699 N.E.2d 507. In *Wagner*, the court declined to

¹ *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (State courts have broad authority to determine whether their decisions shall apply prospectively only).

retroactively apply to the parties before it intervening case law that lowered the burden of proving that an insurer acted in bad faith, even though under *Peerless*, when we overrule a bad decision, "the effect is * * * that the former decision * * * never was the law." *Id.* at 289, 699 N.E.2d 507, citing *Peerless*, 164 Ohio St. at 210, 57 O.O. 411, 129 N.E.2d 467. The court reasoned that the jury had already found that the insurer had acted in bad faith under the higher burden of proof, so remanding the cause to apply the lower burden of proof from the intervening case would serve no purpose. *Id.*

{¶ 14} Therefore, the general rule in Ohio is that a decision will be applied retroactively unless retroactive application interferes with contract rights or vested rights under the prior law. However, a court also has discretion to impose its decision only prospectively after considering whether retroactive application would fail to promote the rule within the decision and/or cause inequity.

C. Chevron Oil Co. v. Huson is Consistent with Ohio Law in Determining Prospective/Retroactive Application of Court Decisions

{¶ 15} Having examined both state and federal law on the issue of prospective/retroactive application of court decisions, we must consider whether we should adopt *Chevron Oil* as the test for determining

when a court decision should be applied only prospectively.

{¶ 16} This court has never considered whether *Chevron Oil* applies to Ohio law.² However, a majority of the appellate districts that have considered the applicability of the *Chevron Oil* test to determine retroactive/prospective application of Ohio court decisions have adopted it.³ See *Anello v. Hufziger* (1st

² In *Hyde v. Reynoldsville Casket Co.* (1994), 68 Ohio St.3d 240, 626 N.E.2d 75, this court held that *Bendix Autolite Corp. v. Midwesco Ents., Inc.* (1988), 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (Ohio's tolling statute was unconstitutional because it violated the Commerce Clause) could not be applied retroactively to bar state claims that accrued before *Bendix* was decided. In *Reynoldsville Casket Co. v. Hyde* (1995), 514 U.S. 749, 115 S.Ct. 1745, 131 L.Ed.2d 820, the appellee argued that *Chevron Oil* required prospective-only application of *Bendix*. The Supreme Court disagreed and reversed this court's judgment, holding that *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74, overruled *Chevron Oil*, and *Harper* required retrospective application of *Bendix*. However, *Bendix* involved a violation of the Commerce Clause, which is a federal issue.

³ {¶ a} Of the appellate districts that have addressed the issue, only the Fourth and Tenth have rejected the *Chevron Oil* analysis. In *Jordan v. Armsway Tank Transport*, Darke App. No. 1621, 2004-Ohio-261, 2004 WL 102785, the Second District Court of Appeals had to decide whether our holding in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, applied retrospectively. In support of his argument that *Galatis* should be applied only prospectively, the appellant urged the court to rely on the test in *Chevron Oil Co.* The court of appeals refused, finding that *Chevron Oil* was "unambiguously overruled by *Harper*." *Jordan* at ¶ 15.

Dist.1988), 48 Ohio App.3d 28, 30, 547 N.E.2d 1220; *Moore v. Natl. Castings* (Dec. 14, 1990), 6th Dist. No. L-89-381, 1990 WL 205004; *Day v. Hissa* (8th Dist.1994), 97 Ohio App.3d 286, 646 N.E.2d 565; and *In re Moore* (7th Dist.), 158 Ohio App.3d 679, 2004-Ohio-4544, 821 N.E.2d 1039. All these appellate districts have recognized the general rule that a decision applies retroactively, but have used *Chevron Oil* as an analytical framework to determine whether prospective-only application is justified. We note that the second and third questions presented in *Chevron Oil* (will retroactive application of the decision serve or hinder the purpose behind the decision to be applied and will retroactive application of that decision cause inequity?) are almost identical to the factors that Ohio courts currently consider in determining whether a decision should receive prospective-only application. See *Wagner*, 83 Ohio St.3d at 289-290, 699 N.E.2d 507 (will retroactive application of the decision promote the purpose of the rule within

{¶ b} In *Jones v. St. Anthony Med. Ctr.* (Feb. 26, 1996), 95APE08-1014, 1996 WL 70997, *6, the issue before the Tenth District Court of Appeals was whether *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 628 N.E.2d 46, applied retroactively. The court rejected the argument that the *Chevron Oil* test applied to determine whether retroactive application of *Clark* was proper, reasoning that *Chevron Oil* does not apply to the Ohio Supreme Court's overruling a prior state common-law decision.

{¶ c} For reasons discussed later in the opinion, we find that neither *Jordan* nor *Jones* persuades us to reject *Chevron Oil*.

that decision, and will retroactive application of the decision cause inequitable results?).

{¶ 17} We note also that the third question by *Chevron Oil*, which asks whether the decision to be applied retrospectively addresses an issue of first impression that was not foreshadowed, is persuasive in determining whether a decision should be applied retrospectively because it gauges the foreseeability of the law being considered for retroactive application. Backward application of such a decision causes great inequity to those who are burdened by unforeseen obligations.

{¶ 18} Therefore, the *Chevron Oil* test is not only consistent with Ohio law in addressing retroactive/prospective application of court decisions, but adds the important consideration of whether the decision addresses an issue of first impression.

D. Chevron Oil Remains Good Law

{¶ 19} DiCenzo argues that *Harper*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74, overruled *Chevron Oil*.

{¶ 20} In *Harper*, federal and military employees of Virginia sought a refund of improperly assessed taxes pursuant to *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891. Michigan had been taxing benefits of federal and military retirees, but not pension benefits of retirees of the state of Michigan and its subdivisions. The

court in *Davis* had held that a state “violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees.” *Id.* at 817, 109 S.Ct. 1500, 103 L.Ed.2d 891. Relying on *Chevron Oil*, the Virginia Supreme Court had affirmed the trial court’s refusal to apply the holding in *Davis* retroactively to taxes that were imposed before *Davis* was decided. *Harper v. Virginia Dept. of Taxation* (1991), 241 Va. 232, 401 S.E.2d 868.

{¶ 21} On appeal, the Supreme Court in *Harper* reversed the judgment of the Virginia Supreme Court, rejecting *Chevron Oil*’s prospective-only application of *Davis*, and remanded the cause for the state court to apply *Davis* retroactively. The court in *Harper* reasoned, “When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” (Emphasis added.) *Harper v. Virginia Dept. of Taxation*, 509 U.S. at 97, 113 S.Ct. 2510, 125 L.Ed.2d 74. The court continued, “Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretation of state law, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-366, 53 S.Ct. 145, 148-149, 77 L.Ed. 360 (1932), cannot extend to their interpretations of federal law.” (Emphasis added.) *Id.* at 100, 113 S.Ct. 2510, 125 L.Ed.2d 74. This language

indicates that *Harper's* limitation of *Chevron Oil* applies to federal law only.

(¶ 22) Several state supreme courts have also held that *Harper's* overruling of *Chevron Oil* applies to federal law only, and therefore *Chevron Oil* may still provide guidance on state court decisions as to retroactivity. See *Findley v. Findley* (2006), 280 Ga. 454, 460, 629 S.E.2d 222 (Georgia Supreme Court declined to adopt rule of "universal retroactivity" in civil cases from *Harper* and instead held that prospective-only application of state court decisions might be warranted if criteria in *Chevron Oil* are satisfied); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 2004 Mont. 391, 104 P.3d 483, ¶ 24, 31 (Montana Supreme Court held that *Harper* overruled *Chevron Oil* as it applied to federal law, but that state decisions may be applied prospectively-only under *Chevron Oil*); *Beavers v. Johnson Controls World Servs., Inc.* (1994), 118 N.M. 391, 398, 881 P.2d 1376 (New Mexico Supreme Court rejected "the hard-and-fast rule [of retroactivity] prescribed for federal cases in *Harper*" and instead held that a presumption of prospectivity can be overcome by a "sufficiently weighty combination of one or more of the *Chevron Oil* factors"); *New Bern v. New Bern-Craven Cty. Bd. of Edn.* (1994), 338 N.C. 430, 442-444, 450 S.E.2d 735 (Supreme Court of North Carolina recognized that *Harper* does not control in determining whether a state court decision that does not interpret federal law may be applied prospectively only); *In re Commitment of Thiel*, 241 Wis.2d 439, 2001 WI App. 52,

625 N.W.2d 321, ¶ 10, fn. 6 (Wisconsin Supreme Court held that *Harper* applied only to federal law, and therefore it does not prohibit application of *Chevron Oil* to matters concerning the retroactivity of state law).

{¶ 23} Pursuant to our understanding of *Harper*, and consistent with the holdings in these cases, we conclude that *Harper* overrules *Chevron Oil*, but only as it applies to federal law. Therefore, we find DiCenzo's argument that *Harper* overrules *Chevron Oil* as applied to Ohio common law to be without merit.

{¶ 24} Finding that *Chevron Oil* remains viable for purposes of analyzing state law, and that it supplements Ohio's retroactive/prospective analysis, we adopt its analytical framework for the purpose of determining when an exception to retroactive application of Ohio state court decisions may be justified. See *Sunburst*, 287 U.S. at 364-366, 53 S.Ct. 145, 77 L.Ed. 360 (state courts may determine whether application of their opinions is retroactive or prospective).

{¶ 25} Accordingly, the general rule is that an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision. *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, syllabus. However, an Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision

establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result. *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296.

E. Chevron Oil Applied to Temple v. Wean

{¶ 26} DiCenzo argues that *Temple v. Wean*, 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, did not contain any language imposing only prospective application, and therefore pursuant to the general rule, *Temple* was, and must continue to be, applied retroactively. DiCenzo also argues that several Ohio appellate decisions purportedly have applied *Temple* retroactively. DiCenzo essentially argues that the passage of time and appellate cases that have applied *Temple* retrospectively preclude us from applying *Temple* only prospectively.

{¶ 27} None of the appellate decisions cited by DiCenzo expressly addressed the forward or backward operation of *Temple*. Thus, none of these decisions specifically set precedent regarding *Temple*'s forward or backward operation. Moreover, we are not bound by these decisions.

{¶ 28} Finally, as we recognized earlier in our analysis, this court has the authority to impose prospective-only application of our decisions. *Minster*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d

1056, ¶ 30. The mere passage of time, without more, does not diminish our authority to impose a prospective-only application of a court decision. That said, prospective-only application is justified only under exceptional circumstances, and a prospective-only application of a court decision that is imposed years after its publication is an even rarer occurrence. Nevertheless, if *Temple* presents us with the extraordinary circumstances that satisfy the *Chevron Oil* test, then prospective-only application may be justified. Accordingly, we hold that *Chevron Oil* can be applied to determine whether prospective-only application of *Temple* is justified.

F. *Under Chevron Oil, Temple Requires Prospective-Only Application*

(¶ 29) We now apply the *Chevron Oil* test to determine whether prospective-only application of *Temple* is justified.

1. Nonmanufacturing-Supplier Liability Was an Issue of First Impression in *Temple v. Wean*

(¶ 30) Historically, a lack of privity between consumers and manufacturers prevented consumers from recovering damages for a defective product under a breach-of-warranty claim against the product's manufacturer. *Wood v. Gen. Elec. Co.* (1953), 159 Ohio St. 273, 50 O.O. 286, 112 N.E.2d 8, paragraph two of the syllabus (consumer could not maintain

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action against manufacturer under breach of warranty for fire damage caused by defective electric blanket); *see also Welsh v. Ledyard* (1957), 167 Ohio St. 57, 4 O.O.2d 27, 146 N.E.2d 299 (consumer could not recover from manufacturer of defective cooking appliance under breach-of-warranty theory because her husband, who had purchased the appliance, had no privity with the retailer). Consumers typically have no contractual ties (i.e., privity) with manufacturers of consumer products because products typically pass from the manufacturer through various middlemen before ultimately reaching consumers. *Inglis v. Am. Motors Corp.* (1965), 3 Ohio St.2d 132, 139, 32 O.O.2d 136, 209 N.E.2d 583, citing *Santor v. A & M Karagheusian* (1965), 44 N.J. 52, 207 A.2d 305. However, in a series of cases issued from 1958 through 1966, this court gradually relaxed certain long-standing legal rules that made consumer actions against *manufacturers* more viable.

{¶ 31} In *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 4 O.O.2d 291, 147 N.E.2d 612, a hair product caused a consumer personal injuries. The consumer filed suit against the manufacturer, alleging negligence, breach of implied warranty, and a breach of express warranty based on the manufacturer's advertisements that the product was safe. *Id.* at 244-245, 4 O.O.2d 291, 147 N.E.2d 612. The issue before this court was whether the consumer could maintain a claim for a breach of an express warranty. *Id.* at 245, 4 O.O.2d 291, 147 N.E.2d 612. The court recognized that the prevailing view was

that privity of contract was required to bring an action alleging the breach of express warranty. However, the court held that the manufacturer's advertisements about its product's safety effectively created an express warranty upon which the consumer could rely and that her breach-of-warranty claim could arise in tort. *Id.* at paragraph three of the syllabus. Thus, the court held that a lack of privity did not prevent her claim for breach of an express warranty against the manufacturer for the defective hair product.

{¶ 32} In *Inglis*, 3 Ohio St.2d 132, 32 O.O.2d 136, 209 N.E.2d 583, the plaintiff succeeded in recovering damages for losses caused by a defectively manufactured automobile under a theory of breach of express warranty. This court affirmed, extending the rule that it had announced in *Toni* (permitting express-warranty claim for personal injury) to the consumer in *Inglis* for recovery of damages against the manufacturer caused by the defective automobile. *Id.* at paragraph three of the syllabus.

{¶ 33} Finally, in *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 35 O.O.2d 404, 218 N.E.2d 185, the court held that even absent privity, a consumer could maintain a claim for the breach of an implied warranty against the manufacturer for injuries caused by its defective product.

{¶ 34} In *Lonzrick*, the plaintiff was injured when steel joists collapsed and fell on him. *Id.* at 228, 35 O.O.2d 404, 218 N.E.2d 185. The plaintiff sued the

manufacturer of the steel joists in tort based upon a breach of an implied warranty. *Id.* at 230, 35 O.O.2d 404, 218 N.E.2d 185. The issue was whether the plaintiff, who was injured by a defective product, could maintain an action alleging breach of an *implied* warranty based in tort, because unlike in *Toni* and *Inglis*, the manufacturer in *Lonzrick* made no advertised representations about the metal beams. The court held that advertising was not relevant to determining whether a manufacturer should be liable. More critical to the analysis was that by placing the product into the stream of commerce, the manufacturer had implicitly represented the product to be of "good and merchantable quality, fit and safe for the ordinary purposes for which such steel joists are used." *Id.* at 236, 35 O.O.2d 404, 218 N.E.2d 185. Thus, the court held that the plaintiff could maintain a claim for breach of an implied warranty against the manufacturer based in tort.

(¶ 35) Thus, in *Toni*, *Inglis*, and *Lonzrick*, the court gradually relaxed the long-held legal requirement of privity, held that a breach-of-warranty claim could arise out of tort, and recognized that a claim for breach of implied warranty was viable when the manufacturer did not advertise. This gradual evolution in the products-liability law was aimed at making *manufacturers* more accessible to consumer-product lawsuits. Indeed, it was the lack of a contractual relationship between consumers and manufacturers that spurred the products-liability evolution in the first place. See Dunwell, *Recovery For Damage to*

the Defective Product Itself: An Analysis of Recent Product Liability Legislation (1987), 48 Ohio St.L.J. 533, 534, *see also Inglis*, 3 Ohio St.2d at 137-138, 32 O.O.2d 136, 209 N.E.2d 583. These cases epitomized the "slow, orderly and evolutionary development" of Ohio products-liability law against *manufacturers*. *Lonzrick*, 6 Ohio St.2d at 239, 35 O.O.2d 404, 218 N.E.2d 185.

{¶ 36} In contrast, *Temple v. Wean* marked a relatively large step in the further development of the products-liability law in its holding, "*One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if*

{¶ 37} "(a) the seller is engaged in the business of selling such a product, and

{¶ 38} "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." (Emphasis added.) *Temple*, 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, paragraph one of the syllabus.

{¶ 39} Although plaintiff's evidence in *Temple* failed to prove liability against multiple defendants, the court's analysis makes clear that for the first time, the court defined a rule that allowed *nonmanufacturing* suppliers to be liable for defective products that they sell. We begin our review of the analysis in *Temple* by examining the facts.

{¶ 40} Betty Temple was injured by a punch press. Wean United Incorporated manufactured the punch press, which was sold to General Motors Corporation ("G.M."). *Temple*, 50 Ohio St.2d at 318, 4 O.O.3d 466, 364 N.E.2d 267. G.M. in turn sold the punch press to Turner Industries, and Turner sold it to Wean, the plaintiff's employer. *Id.* After her injury, Temple sued Wean United, as well as the subsequent punch-press vendors, G.M. and Turner. *Id.* at 319, 4 O.O.3d 466, 364 N.E.2d 267.

{¶ 41} *Temple* adopted 2 Restatement of the Law 2d, Torts (1965), Section 402A, holding that "a plaintiff must prove that the product was defective at the time it left the seller's hands" for the seller to be held liable. *Temple*, 50 Ohio St.2d at 322, 4 O.O.3d 466, 364 N.E.2d 267. However, the evidence showed that the press had been modified *after* it had been sold to plaintiff's employer and that the modification was the cause of the plaintiff's injury. *Id.* at 323, 4 O.O.3d 466, 364 N.E.2d 267. This circumstance "absolve[d] the manufacturer, Wean, and the *subsequent vendor*, G.M., from strict tort liability." (Emphasis added.) *Id.* at 324, 4 O.O.3d 466, 364 N.E.2d 267. G.M. was a nonmanufacturing seller of the press.

{¶ 42} Thus, *Temple* clearly defined a new rule that nonmanufacturing suppliers of products could be held liable for injuries caused by those products. Prior to *Temple*, no holding from this court had permitted the seller of a product who was not also the manufacturer to be liable for a defective product under a

breach-of-warranty theory based in tort absent privity, and none foreshadowed that such a holding was on the horizon. Clearly, *Temple* addressed an issue of first impression that had not been foreshadowed in prior cases.

2. Retroactive Application of *Temple* Neither Promotes Nor Hinders the Purpose Behind the Products-Liability Law

{¶ 43} The second prong of the test in *Chevron Oil* asks whether applying the decision retroactively promotes or hinders the purpose behind the rule stated in the decision. *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296. We conclude that retroactive application of *Temple* will neither promote nor hinder the purpose behind the products-liability law.

{¶ 44} A primary "purpose of the strict liability doctrine is to induce manufacturers and suppliers to do everything possible to reduce the risk of injury and insure against what risk remains." *In re Goldberg 23 Trial Group* (May 9, 2006), Cuyahoga C.P. No. SD-97-073958; see also *Prentis v. Yale Mfg. Co.* (1984), 421 Mich. 670, 689-690, 365 N.W.2d 176 ("a primary purpose of products liability law is to encourage the design of safer products * * *").

{¶ 45} Products containing asbestos have not been manufactured or sold for approximately 30 years. The time for making these products safer has come and gone. Thus, retroactively applying *Temple*

to nonmanufacturing sellers of asbestos products will not promote the purpose of making those products safer.

(¶ 46) Moreover, one of the expressed reasons for the adoption of Section 402A of 2 Restatement of the Law 2d, Torts, in *Temple* was that "there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort, and * * * the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area." (Footnote omitted.) *Temple*, 50 Ohio St.2d at 322, 4 O.O.3d 466, 364 N.E.2d 267. Again, applying *Temple* retroactively to impose liability on a nonmanufacturing supplier of asbestos products would neither promote nor impede the purpose of facilitating the analysis of products-liability law.

3. It Would Be Inequitable to Impose
Temple on Nonmanufacturing Suppliers
of Asbestos Products

(¶ 47) As we noted in section I. above, *Temple*, which was decided in 1977, marked the first time this court had held that a nonmanufacturing seller of a product could be held liable for injuries caused by a defective product. Thus, nonmanufacturing sellers of asbestos, such as Hamilton, could not have foreseen that these products, distributed from the 1950s to the 1970s, could decades later result in Hamilton's being liable for injuries caused by that product. Imposing

such a potential financial burden on these nonmanufacturing suppliers years after the fact for an obligation that was not foreseeable at the time would result in a great inequity.

{¶ 48} Thus, the answers to the questions posed in *Chevron Oil* collectively indicate that our decision in *Temple* should be applied prospectively only. Therefore, we hold that *Temple v. Wean* applies only prospectively. Accordingly, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

Judgment reversed.

O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

MOYER, C.J., dissents without opinion.

PFEIFER, J., dissents with opinion.

PFEIFER, J., dissenting.

{¶ 49} What the majority does today is unheard of. It revisits a case decided over 30 years ago, declares that that case's holding should be applied prospectively only, and thereby exempts an entire class of defendants from strict tort liability. Today's holding is an affront to stare decisis, runs contrary to our own case law, and makes a mockery of the *Chevron Oil* test while ostensibly applying it. More importantly, today's decision leaves Ohioans asking, "What is the law?"

{¶ 50} Before today, a simple rule applied regarding the applicability of this court's decisions: "In the absence of a specific provision in a decision declaring its application to be prospective only, * * * the decision shall be applied retrospectively as well.'" *Lakeside Ave. Ltd. Partnership v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 125, 127, 707 N.E.2d 472, quoting *State ex rel. Bosch v. Indus. Comm.* (1982), 1 Ohio St.3d 94, 98, 1 OBR 130, 438 N.E.2d 415. This court has made certain decisions prospective only. See *Oamco v. Lindley* (1987), 29 Ohio St.3d 1, 2, 29 OBR 122, 503 N.E.2d 1388; *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 30. The United States Supreme Court allowed for such prospective pronouncements in *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, holding that state courts have broad authority to determine whether their decisions shall operate prospectively only. "Consistent with what has been termed the *Sunburst* Doctrine, state courts have * * * recognized and used prospective application of a decision as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action.'" *Minster Farmers*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, at ¶ 30, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 9, 19 OBR 1, 482 N.E.2d 575 (Douglas, J., concurring).

(¶ 51) Courts applying the *Sunburst* doctrine leave no doubt as to what the law is and to whom it applies; the determination that the decision will be prospective only is made clear in the very opinion that announces the decision. This court could have applied the *Sunburst* doctrine in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, the case the majority exhumes today, had it intended a prospective-only application of that decision. In *Temple*, this court held that suppliers – not just manufacturers – were strictly liable for defective products they supplied. Certainly the *Temple* court foresaw that other suppliers in other cases could likewise be held strictly liable for the products they supplied. Yet this court in *Temple* did not exempt those other suppliers from the court's holding. For decades, anyone – especially defendant-suppliers involved in asbestos-injury cases – would have believed that the decision in *Temple* was retroactive. That logical belief, rooted in the stability of this court's decisions, is now torn asunder.

(¶ 52) As applied in this case, the test set forth in *Chevron Oil. Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, does violence to stare decisis. In this case, the majority takes the test that has been subsequently rejected by the court that created it and has adopted it in Ohio. In *Chevron Oil*, the United States Supreme Court developed a three-part test to determine whether a decision should apply only prospectively to a particular plaintiff. In *Chevron Oil*, the law – specifically, a statute of

limitations – changed during the pendency of the plaintiff Huson's case, barring his already pending claim. The statute of limitations had not been an issue in Huson's case until the court's decision in *Rodrigue v. Aetna Cas. & Sur. Co.* (1969), 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360. The court set forth three separate factors as to whether *Rodrigue* should apply to Huson's case:

(¶ 53) "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.* [(1968), 392 U.S., 481, 496, 88 S.Ct., 2224, 20 L.Ed.2d 1231], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen v. State Board of Elections* [(1969), 393 U.S. 544, 572, 89 S.Ct. 817, 22 L.Ed.2d 1]. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker* [(1965), 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano v. City of Houma* [(1969), 395 U.S. 701,

706, 89 S.Ct. 1897, 23 L.Ed.2d 647].” *Chevron Oil*, 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296.]

{¶ 54} The court concluded that as to that particular plaintiff, Huson, the answer was affirmative to all three inquiries and held that the holding in *Rodrigue* did not apply to Huson. *Chevron Oil* at 100, 92 S.Ct. 349, 30 L.Ed.2d 296. Notably, in *Chevron Oil*, the prospective application applied to only the plaintiff. Here, the majority appears to make *Temple* prospective as to any defendant asbestos supplier.

{¶ 55} The United States Supreme Court has since repudiated the *Chevron Oil* test, holding, “When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74. While the court left to the states their own determination of prospective application as to their own cases, the high court’s jurisprudential imprimatur is now missing from the *Chevron Oil* test.

{¶ 56} Still, as the majority relates, some states continue to rely on the *Chevron Oil* test to determine whether cases should be applied prospectively. The test has never been adopted by this court, though it has been used by other Ohio appellate courts. However, in all the Ohio cases cited by the majority, as in

Chevron Oil itself, the courts were dealing with instances in which the law changed during the pendency of the underlying case, and the court was left to determine whether the new or old law should apply.

(¶ 57) That is hardly the case in this matter. *Temple* was decided long before this case was filed. This is not an instance in which the matter had proceeded under one set of rules and then the law changed during the course of litigation.

(¶ 58) Even if we were to apply the *Chevron Oil* test in this case, a prospective-only application is not justified. The first element of the test is whether the decision established a new principle of law that was not clearly foreshadowed. The majority states that *Temple* defined a new rule that nonmanufacturing suppliers of products could be held liable for injuries caused by those products, that *Temple* “addressed an issue of first impression that had not been foreshadowed in prior cases.” The holding in *Temple* did not come out of the blue or from the back of a cocktail napkin – it came from Section 402A of the Restatement of the Law 2d, Torts, and was a culmination of long-developing Ohio law. The Restatement itself is a roadmap of where courts are going. The court in *Temple* reviewed the development of the law that led to its eventual adoption of Section 402a of the Restatement:

(¶ 59) “Although this court has never expressly adopted Section 402A as the standard for strict liability in tort, we did, in *Lonzrick* [*v. Republic Steel*

Corp. (1966), 6 Ohio St.2d 227, 35 O.O.2d 404, 218 N.E.2d 185], cite Section 402A, as well as *Greenman v. Yuba Power Products* (1963), 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, the first case to apply the principles underlying the section. Since *Greenman* was decided, the rule of the Restatement has been adopted or approved by the vast majority of courts which have considered it. Because there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d." (Footnotes omitted.) *Temple*, 50 Ohio St.2d at 322, 4 O.O.3d 466, 364 N.E.2d 267.

(¶ 60) *Temple* continued an entirely predictable progression of the law, foreshadowed by this court's previous citation in *Lonzrick* to the Restatement section it eventually adopted in *Temple*. *Temple* thus does not meet the first prong of the *Chevron Oil* test.

(¶ 61) As for the second prong, whether retroactive application of the decision promotes or hinders the purpose behind the decision, the majority takes a neutral view, finding that "retroactive application of *Temple* will neither promote nor hinder the purpose behind the products-liability law." If there is such a neutral result, then the extraordinary remedy of prospective application should not lie. Further, at least part of the aim of strict products liability is to protect the consumer. Certainly, a retroactive application of

Temple allows a consumer to gain the benefit of those protections.

{¶ 62} The final prong to consider is whether retroactive application of the decision might cause an inequitable result. The majority is unable to point to evidence regarding the inequitable effect as to this particular defendant; it levels a blanket assumption that generic nonmanufacturing sellers of asbestos could not have foreseen potential liability. Only this majority could conclude that the equities here lie with the entities that profited from the decades-long distribution of poisonous materials that demonstrably caused horrific damage to Ohio workers. Moreover, what of the thousands of cases already tried or settled involving asbestos suppliers? Is there equity in holding the suppliers in those cases to a different standard than the suppliers who will benefit from this case? Finally, asbestos suppliers have long been a part of the asbestos-litigation system. To excuse them all from strict liability would be a shock to the entire system. Should suppliers alone be free from the fallout from asbestos?

{¶ 63} Where do we go from here? Any responsible defense attorney would now seek the prospective-only application of *Lonzrick*, which established strict liability for manufacturers. An audacious attorney and a willing court could accomplish a lot.

{¶ 64} We need to think about what today's decision means to this court as an institution. As a court that accepts cases in areas of the law that are

unsettled, any of our decisions could come under attack decades later because they offered a new perspective of the law at the time they were decided. Need we constantly look ahead, and guard against future meddling by stamping each decision "Retroactive and Prospective"? Is not the better practice to signal prospective-only application as we have previously done – by mentioning it in the opinion? This court spoke by not speaking in *Temple*. Had this court sought to make its holding prospective only, it could have done so. Had this court in *Temple* had any idea what this majority could convince itself to do 30 years later, is there any doubt that this court would have explicitly called for retroactive application? Is there any doubt?

2007 WL 1976735

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
Genevieve DICENZO, etc., Plaintiff-Appellant
v.
A-BEST PRODUCTS COMPANY, INC., et al.,
Defendants-Appellees.
No. 88583.

Decided June 28, 2007.

Civil Appeal from the Cuyahoga County Court of
Common Pleas, Case No. CV-404588, CV-514986.

Mark C. Meyer, Joseph J. Cirilano, Diana Nick-
erson Jacobs, Charles J. McLeigh, Jason T. Shipp,
Goldberg, Persky & White, P.C., Pittsburgh, PA, John
J. Duffy, John J. Duffy & Associates, North Olmsted,
OH, for plaintiff-appellant.

Bruce P. Mandel, Max W. Thomas, Ulmer &
Berne LLP, Cleveland, OH, for appellee Borg-Warner
Corp.

Ruth A. Antinone, Michael A. Katz, Willman &
Arnold, LLP, Pittsburgh, PA, for appellee George V.
Hamilton, Inc.

KENNETH A. ROCCO, J.

{¶ 1} Plaintiff-appellant, Genevieve DiCenzo,
appeals from a common pleas court order granting
summary judgment in favor of defendants-appellees,
Borg-Warner Corporation and George V. Hamilton,
Inc. on her claims for injuries sustained by the dece-
dent, Joseph DiCenzo, as well as her claims for

wrongful death and loss of consortium as a result of the defendants' negligence, breach of warranty, failure to warn, and defective product design. She contends that she presented evidence establishing that Joseph DiCenzo was exposed to asbestos products manufactured by Borg-Warner, and that this exposure was a substantial factor in causing his mesothelioma. She further contends that Hamilton is subject to strict liability as a supplier in a product liability action, and that genuine issues of material fact precluded judgment on her claim against Hamilton for negligent failure to warn.

{¶ 2} The record before us consists of an agreed group of filings from the underlying case which the parties have deemed necessary to our review. The limited nature of the record makes a review of the procedural history of the case impractical. We note, however, that the record does include the court's orders granting Borg-Warner's motion for summary judgment, Hamilton's motion for summary judgment as to plaintiff's negligence claims, and Hamilton's motion for judgment on plaintiff's strict liability claim. The record also includes a "final order" dismissing the case because all claims by or against all parties had been determined.

{¶ 3} We review the trial court's order granting summary judgment de novo, applying the same standard of review which the trial court applied. As in any case, summary judgment is appropriate in an asbestos case if (a) no genuine issue of material fact remains to be litigated, (b) the moving party is

entitled to judgment as a matter of law, and (c) construing the evidence in the light most favorable to the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686-87, 1995-Ohio-286.

Facts

{¶ 4} The evidence here showed that plaintiff's decedent, Joseph DiCenzo, was diagnosed with mesothelioma in November 1999 and died on February 22, 2000. Plaintiff submitted expert reports opining that his mesothelioma was caused by his occupational exposure to asbestos.

{¶ 5} DiCenzo worked at Wheeling Pittsburgh Steel's Yorkville, Ohio plant from 1952 to 1993, except for a leave of absence between 1953 and 1955 for military service. His career was primarily spent in the tin plating department, where he worked in various capacities from laborer to tin line operator. Several of his coworkers provided deposition testimony about asbestos products that were used in the plant, particularly on the tin line.

{¶ 6} Co-worker Frank Pempek testified that he worked at the Yorkville plant from 1953 to 1988, and specifically recalled working with DiCenzo from 1960. He recalled that DiCenzo's job was performed from a platform under which there were asbestos-covered steam pipes. Portions of both the platform and the steam pipe coverings were replaced every year. He

specifically recalled that Johns Manville and Kaylo pipe coverings were used. He recalled seeing boxes of Kaylo insulation from the late 1950's or 1960 until 1980.

{¶ 7} Co-worker Joseph Tysk testified that he worked with DiCenzo from 1973 until the early 1990's. He testified that they worked daily with an overhead crane, the brake pads for which contained asbestos. He specifically recalled Borg-Warner as a brand of brake pads that was used between 1973 and 1975 and thereafter. He saw Borg-Warner brake pads in the storeroom throughout his career, from 1973 through 1995; the cranes were the only place they could have been used. Although neither Tysk nor DiCenzo actually changed the brake pads, they did work under the cranes while this was being done. Tysk also recalled that DiCenzo worked around pipe insulation.

{¶ 8} Co-worker Ronald Shane testified that he worked with DiCenzo at the Yorkville plant from 1964 to 1994. He testified that they worked around asbestos insulated pipes and asbestos brake linings, although he did not recall any of the manufacturers of these products. He recalled having seen the name "Borg-Warner" but did not recall what kind of product it was associated with.

{¶ 9} Co-worker Thomas Strauss testified that he worked with brake linings and pipe coverings at the Yorkville plant that contained asbestos from 1969. He recalled Borg-Warner as one of the manufacturers

of the brake linings. However, he later admitted that he did not specifically recall seeing the name "Borg-Warner" on any product in the Yorkville Plant. He did not recall the manufacturer of any of the pipe coverings.

{¶ 10} Co-worker Roger McMannis worked at the Yorkville plant from 1955 until 1998. He worked near DiCenzo from the 1960's until 1972. He recalled that Kaylo pipe coverings were used in the tin line area. Co-worker Harry Bickerstaff testified that he began working at the Yorkville plant in 1972 and met DiCenzo at approximately a year after he started. He recalled that DiCenzo worked around asbestos pipe covering. He further testified that he unloaded insulation from trucks with the name "Hamilton" on them, although he could not remember the details of the type of insulation. He also testified that there was another pipe insulation supplier; he could not estimate the percentage of insulation that each company supplied.

{¶ 11} Owens Corning distributed asbestos-containing Kaylo insulation products from 1953 until 1973. Hamilton distributed Kaylo products from 1963. It sold insulation products to Wheeling Pittsburgh Steel, including the Yorkville plant.

{¶ 12} In its answers to interrogatories, Borg-Warner stated that it manufactured disc brake pads which contained asbestos for vehicle model years 1971 to 1975. It claimed these were sold for automotive

use. It also sold clutch assemblies with asbestos-bearing components.

Law and Analysis

{¶ 13} “For each defendant in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant’s product and that the product was a substantial factor in causing the plaintiff’s injury. A plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury.” *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686-87, 1995-Ohio-286.

Summary Judgment for Borg-Warner

{¶ 14} In its motion for summary judgment, Borg-Warner argued that plaintiff could present no evidence that Joseph DiCenzo was exposed to its products. Only one of DiCenzo’s co-workers, Joseph Tysk, was able to identify Borg-Warner as the manufacturer of brake pads that were used on the overhead cranes in the tin line department. On cross-examination by Borg-Warner’s counsel during his deposition, Tysk testified:

Q: And you mentioned that there were brake pads on the cranes, and you associated those brake pads with the name Borg-Warner.

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How is it that you would know the names of those brake pads?

A: Working in the storeroom in my career, the electric shop was right next to our storeroom, and this is where I became acquainted with some of the material.

* * * *

Q: And you have to explain a little further for me, how do you, how does that bring to mind the name Borg-Warner, how do you know that name?

A: I, I seen that, I seen that in the storeroom, because we disbursed some of this stuff.

Q: And what was it that you saw in the storeroom related to that name?

A: I, I actually saw brake pads in the storeroom.

Q: Okay. When did you work in the storeroom?

A: That went throughout my career, from 1973 to 1995.

* * * *

Q: So you associate the name Borg-Warner with brake pads that you saw in the storeroom. When you disbursed brake pads, do you have a specific recollection of disbursing, yourself, Borg-Warner brake pads?

A: I can't say that I actually did, but I know the gentleman I was

* * * *

Q: How would you know where those were going and what they were being used on?

A: Well, they, in my book, they could only go on one place and that would be the cranes.

Q: Do you know that for certain?

A: Yes.

{¶ 15} Several of DiCenzo's co-workers testified that DiCenzo worked below the cranes and would have continued to do his job there even when the cranes were being repaired. There was also testimony from co-worker Thomas Strauss that the brake pads sometimes had to be drilled and cut to fit, and this process created dust.

{¶ 16} Borg-Warner's answers to interrogatories indicated that the brake pads it manufactured between 1971 and 1975 contained 7% to 28% asbestos fibers, both crocidolite and chrysotile. The expert report of Dr. John Dement opined that asbestos fibers in brakes can break free in the braking process and during the grinding and manipulation process involved in initial installation. Dr. Dement further stated that asbestos fibers that become airborne settle very slowly and can travel great distances on normal air currents, a phenomenon he described as

“fiber drift.” It is also readily resuspended when disturbed.

{¶ 17} The evidence presented by plaintiff in opposition to Borg-Warner’s motion for summary judgment created a genuine issue of material fact whether DiCenzo was exposed to asbestos from Borg-Warner’s brake products. This evidence is not based on mere assumptions, as Borg-Warner suggests, but on actual testimony from Mr. Tysk that Borg-Warner brake pads were used on the overhead cranes, and from other testimony that dust is released from brakes during the installation process and during their use, that this dust can contain asbestos, that the asbestos can remain airborne and can travel a considerable distance, and that Mr. DiCenzo worked directly below the cranes.

{¶ 18} Borg-Warner argues that there was no evidence that DiCenzo’s exposure to its products was a “substantial factor” in causing him harm. Again, we must disagree. DiCenzo worked directly below the cranes. There was evidence from which we may infer that asbestos fibers were released from the cranes’ brakes both during their installation and removal and during their use. These fibers became airborne. Common sense – and the law of gravity – suggests that a worker will easily inhale dust settling down from directly above him or her.

{¶ 19} Borg-Warner is merely tilting at windmills when it claims that “fiber drift” is insufficient to demonstrate that its products were a substantial

factor in causing Mr. DiCenzo's disease. Plaintiffs here are not claiming that Mr. DiCenzo's exposure to Borg-Warner's products occurred only through fiber drift. Rather, there is evidence in the record not only that Borg-Warner's products were in the Yorkville plant, but that they were used *directly above* the area where Mr. DiCenzo worked. Thus, unlike the plaintiffs in *Vince v. Crane Co.*, Cuyahoga App. No. 87955, 2007-Ohio-1155, plaintiffs here have presented evidence of direct exposure to BorgWarner's products.

{¶ 20} While we do not know the frequency with which Borg-Warner brake pads were used as compared to other manufacturers, nor do we know the amount of asbestos that may have been released from the brake pads as compared to other sources which could also have contributed to his disease, it is not necessary for a plaintiff to quantify the proportion of asbestos in the workplace that is attributable to the defendant in order to demonstrate that the defendant's product is a "substantial factor" in causing plaintiff's disease. Indeed, the supreme court specifically stated that "[a] plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury." *Horton*, 73 Ohio St.3d at 686. In this case, however, the plaintiff did show that the decedent was exposed to Borg-Warner's brakes over an extended period of time and in close proximity to where he worked. Thus, there is a genuine issue

whether Borg-Warner's products were a substantial factor in causing his mesothelioma.

(¶ 21) Genuine issues of material fact precluded judgment for Borg-Warner. Accordingly, we reverse the judgment in favor of Borg-Warner and remand for further proceedings.

***Summary Judgment for
George V. Hamilton, Inc.***

(¶ 22) Hamilton filed three separate motions for summary judgment in the proceedings below, first, a motion for summary judgment based on lack of product identification, second, a motion requesting a separate ruling on the issue of strict liability, and third, a motion for summary judgment with respect to plaintiff's claims of negligent failure to warn, breach of warranty, conspiracy, alternative liability and market share liability. Separate rulings on the individual motions indicates that the court granted the second and third motions, but denied the first.

(¶ 23) In the trial court, plaintiffs did not respond to Hamilton's motion or its oral argument that it could not be subject to strict liability as a supplier because the Ohio Supreme Court's decision in *Temple v. Wean* (1977), 50 Ohio St.2d 317,¹ did not apply

¹ In *Temple v. Wean*, the Ohio Supreme Court adopted the formulation of a strict liability claim set forth in Restatement of the Law 2d, Torts, § 402A: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or

(Continued on following page)

retroactively to suppliers with respect to asbestos-containing products sold prior to the *Temple* decision. To be sure, plaintiff's response to defendants' motions for summary judgment does argue that sellers of asbestos products may be held strictly liable. However, plaintiff does not address the issue of the retroactive application of *Temple*. Therefore, appellant failed to preserve this issue for appeal. See, e.g., *Shover v. Cordis* (1991), 61 Ohio St.3d 213, 220; *Federated Management Co. v. Coopers & Lybrand* (2000), 137 Ohio App.3d 366, 380-81.

{¶ 24} Nonetheless, it is well settled that we review trial court decisions on issues of law de novo. See, e.g., *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214. It is equally well settled that cases should be decided on their merits. *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 222. The so-called "retroactive" application of *Temple v. Wean* to impose liability on a seller for sales occurring before 1977 (when *Temple* was decided) is a necessary precondition to plaintiff's strict

consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

liability claim,² and has never been called into question before,³ to our knowledge, at least at the appellate level. Consequently, in the interests of fairness we will consider the issue here.

{¶ 25} In concluding that *Temple v. Wean* should not be applied retroactively, the trial court applied the test used by the United States Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, for retroactive application of new rules of federal law. The *Chevron* court applied a tripartite test to determine whether the new rule of law should be applied retroactively:

First, the decision to be applied non retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * .

² Appellants agree with the defendants that "O.R.C. § 2307.78(B) cannot be applied retroactively with regard to asbestos exposure occurring before 1987, the date of enactment of the statute." Appellant curiously argues in the alternative that "should this Court determine that O.R.C. 2307.78(B) may be applied retroactively, that G.V. Hamilton is subject to liability under Ohio's supplier statute." Given appellant's agreement that the statute does not apply retroactively, there is no actual controversy regarding this issue in this case. Therefore, we decline to address this argument. Appellant's only potential theory of strict liability lies with *Temple v. Wean*.

³ The trial court previously decided this issue in *In re Goldberg 23 Trial Group*. However, we are not aware of any appeal of that decision.

Second, it has been stressed that “we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” * * * * Finally, we have weighed the inequity imposed by retroactive application, for “where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.” * * * *

Chevron, at 106-07.

{¶ 26} Plaintiff asserts that *Chevron* was overruled by *Harper v. Virginia Dept. Of Taxation* (1993), 509 U.S. 86. In *Harper*, the Supreme Court held that “[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”

{¶ 27} Clearly, if the *Harper* analysis applies, *Temple v. Wean* must be applied retroactively to events which predated that decision. While it is not entirely clear that *Harper* overrules *Chevron*, however, see *Hyde v. Reynoldsville Casket Co.*, 68 Ohio St.3d 240, 1994-Ohio-67, we conclude that even under *Chevron*, *Temple v. Wean* should apply retroactively.

{¶ 28} We disagree with the trial court's conclusion that *Temple v. Wean* established a new principle of law. In fact, the Ohio Supreme Court relied upon Restatement of the Law 2d, Torts, § 402A as early as 1966. In *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 239, the supreme court cited § 402A, among other authorities, to establish a cause of action for breach of implied warranty in the absence of privity of contract. The court in *Temple* concluded that "there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort." *Temple*, 50 Ohio St.2d at 322. Thus, the primary effect of *Temple* was to incorporate the Restatement into Ohio law expressly, not to create a new cause of action. Cf. *McAuliffe v. W. States Import Co.*, 72 Ohio St.3d 534, 539 (noting that strict product liability causes of action existed before the Ohio Product Liability Act, and citing, e.g., *Lonzrick*.)

{¶ 29} As the trial court noted in its decision in *In re Goldberg 23 Trial Group*, the primary goal of *Temple* was to facilitate analysis of strict liability cases by incorporating the Restatement formulation and its numerous illustrative comments. *Temple*, 50 Ohio St.2d at 322. This goal would certainly be hampered if the Restatement's analysis were not applied in all cases decided after *Temple*. It would artificially limit the body of law to be considered, forcing unnecessary reinvention to fill in analysis the Restatement could readily supply.

{¶ 30} Finally, we cannot say that application of *Temple* to suppliers of asbestos products before 1977 would be inequitable. As noted above, there is virtually no distinction between the implied warranty cause of action recognized by *Lonzrick* in 1966 and the strict liability theory under the Restatement adopted by *Temple*. Thus, defendants are not held to any higher standard than they were already required to meet. Therefore, we hold that *Temple* applies retroactively to suppliers, like Hamilton, who may have supplied asbestos products before the *Temple* case was decided.

{¶ 31} In its motion for summary judgment, Hamilton did not argue the merits of plaintiff's strict liability claim against it under the Restatement formulation adopted in *Temple*. Undoubtedly, many factual and legal issues may yet arise, e.g., as to whether, Hamilton is a "seller" and whether Mr. DiCenzo is a "user or consumer." See Restatement of the Law 2d, Torts, § 402A, comment o.⁴ Accordingly,

⁴ "Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment l. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been

we must reverse and remand for further proceedings on appellant's strict liability claim against Hamilton.

{¶ 32} Appellant also urges that there is a genuine issue of material fact regarding its claim against Hamilton for negligent failure to warn because she presented evidence that Hamilton knew about the dangers of asbestos as early as 1961, there was no evidence that DiCenzo knew about those dangers, yet Hamilton did not warn DiCenzo or other employees of the hazard. Plaintiffs make the blanket assertion that "Hamilton had the opportunity to warn Mr. DiCenzo and other co-workers of the hazards of asbestos-containing products it supplied through verbal, written, or in person communication." While plaintiffs suggest such measures as warning labels or informational literature, there is no evidence to suggest that such information could have reached DiCenzo, who did not work directly with the pipecovering Hamilton supplied. "[T]he requirement of an adequate warning extends only to those to whom the distributor has reasonable access." *Hargis v. Doe* (1981), 3 Ohio App.3d 36, 38. Plaintiffs did not demonstrate that Hamilton had reasonable access to DiCenzo, so there was no evidence that any failure to warn was a proximate cause of DiCenzo's injury. *Id.*

largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons."

{¶ 33} Accordingly, we reverse the judgment in favor of Borg-Warner Corporation and remand for further proceedings. We affirm the judgment in favor of George v. Hamilton, Inc. with respect to plaintiff's claim for negligent failure to warn, but reverse the judgment in favor of George V. Hamilton, Inc. with respect to plaintiff's strict liability claim, and remand for further proceedings on that claim as well.

Affirmed in part; reversed in part.

It is ordered that each party shall bear her or its own costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, P.J., and PATRICIA ANN BLACKMON, J., concur.

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Court: OH Cuyahoga County Court of Common Pleas

File & serve reviewed Transaction ID: 11382169

Current date: 6/27/2006

Case number: Multi-case

Case name: Multi-case

Motion Granted

Judge Leo M. Spellacy

[LOGO]

GRANTED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Joseph DiCenzo	)	Case No. 00-404588
Thomas Fitzgerald	)	Case Nos. 03-504947
William Paris	)	Case No. 99-380361
)	
	)	Judges Hanna and Spellacy
	)	Justice Sweeney

DEFENDANT, GEORGE V. HAMILTON, INC.'S,
MOTION REQUESTING SEPARATE RULING
ON THE ISSUE OF STRICT LIABILITY

AND NOW comes the Defendant, George V. Hamilton, Inc., by and through its counsel, Willman & Arnold, LLP, and files the within Motion Requesting

Separate Ruling on the Issue of Strict Liability, and in support avers as follows.

The Defendant, George V. Hamilton's, Motion for summary Judgment for Lack of Product Identification is still pending, and is scheduled to be argued on June 1, 2006. For the court's convenience, the Defendant, George V. Hamilton, has filed the following Motion Requesting Separate Ruling On the Issue of Strict Liability, so that, if necessary, this Court can rule separately on any strict liability claims in the above-referenced cases. The Defendant, George V. Hamilton, does not wish to have this motion replace its Motion for Summary Judgment Based on Lack of Product Identification, but wishes this motion to serve as an alternative basis in which this Court can rule if Defendant's Product Identification Motion for Summary Judgment is not granted.

On May 9, 2006, this Honorable Court issued its opinion with regard to the application of Section 402A of the Restatement of Torts 2d's to suppliers of asbestos-containing products (attached as Exhibit "A"). This Honorable Court found that the Ohio Supreme Court's ruling in *Temple v. Wean* (1977) did not apply retroactively, and therefore, could not impose strict liability upon suppliers who sold asbestos-containing products prior to 1977.

The above-named Plaintiffs have offered evidence against Defendant, George V. Hamilton, for supplying asbestos-containing Kaylo pipe covering and/or block to

various Wheeling-Pittsburgh Steel facilities. Owens-Corning was the manufacturer of Kaylo pipe covering and block. They ceased manufacturing asbestos-containing Kaylo products in November of 1972 (attached as Exhibit "A-1"). Therefore, Defendant, George V. Hamilton, cannot be strictly liable for supplying asbestos-containing products post-1977, and should have all strict liability claims against them dismissed in the above-named Plaintiffs' actions.

WHEREFORE, Defendant, George V. Hamilton, Inc., respectfully requests that this Honorable Court grant a dismissal of all strict liability claims against this Defendant as to the above-named Plaintiffs' cases.

Respectfully submitted,

WILLMAN & ARNOLD, LLP

/s/ **David A. Wingenroth**

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was electronically filed via the File & Service system and deemed served on all

parties pursuant to Cuyahoga County Rules of Court
this 26th day of May, 2006.

/s/ **David A. Wingenroth**

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

In re) JUDGE
Goldberg 23 Trial Group) HARRY A. HANNA
	) JUDGE
	) LEO M. SPELLACY
	) JUSTICE
	) FRANCIS E. SWEENEY
	) ENTRY & OPINION

On March 10 and April 11 of 2006, this Court heard oral arguments on whether Ohio Revised Code § 2307.78(B) imposes strict liability upon suppliers of asbestos-containing products for conduct that occurred before the effective date of the statute. At the latter hearing, plaintiffs represented by the Goldberg firm conceded that a retroactive application of R.C. §2307.78(B) would constitute a violation of Section 28, Article II of the Ohio Constitution. Instead, Plaintiffs argued that the Ohio Supreme Court holding in *Temple v. Wean* (1977), 50 Ohio St. 2d 317, imposes strict liability upon non-manufacturer suppliers in that it expressly adopts Section 402A of the Restatement of Torts 2d. That the *Temple* decision prospectively imposes strict liability on non-manufacturer suppliers is not in dispute. However, plaintiffs contend that the Supreme Court's holding in *Temple* must be applied retroactively, thereby imposing strict liability on suppliers who sold asbestos-containing products prior to the 1977 decision. This Court disagrees.

It is true that, as a general rule, an Ohio Supreme Court decision overruling a previous decision is to be applied retrospectively. *Wendell v. Ameritrust Co., N.A.* (1994), 69 Ohio St. 3d 74, citing *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209. This general rule has been extended to cover only those cases where a previous decision is being overruled, but also those cases where the Supreme Court is interpreting a statute. *Anello v. Hufziger* (1988), 48 Ohio App.3d 28. However, in *Anello*, the Court of Appeals for Hamilton County recognized that there should be exceptions to this general rule and adopted a test for determining when such exceptions should be granted.

The test adopted was first espoused by the United States Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, and requires the consideration of three separate factors. First, the Court must determine whether the decision at issue establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citations omitted). Second, a Court must examine "the prior history of the rule in question, its purpose and effect, and whether retrospective operations will further or retard its operation." *Id.* Finally, it must be determined whether the retrospective application will produce "substantial inequitable results." *Id.*

Upon consideration of each of these factors, we conclude that the *Temple* decision should not be applied retroactively. All parties appear to agree that, before *Temple*, strict liability for non-manufacturer suppliers of defective products did not exist in Ohio. The *Temple* Court's express adoption of Section 402A of the Restatement, and the consequent imposition of strict liability on non-manufacturer suppliers, is thus an establishment of a new principle of law. Moreover, having reviewed the case law as it existed prior to *Temple*, we see no evidence to indicate that this change in the law would have been clearly foreshadowed.

The *Temple* Court states that it is adopting Section 402A "[b]ecause there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort¹

¹ To support its position that no distinction existed between Ohio's implied warranty in tort and Restatement Section 402A, the *Temple* Court cites to a note published in the Ohio State Law Journal. See Note, Products Liability: A Synopsis, 30 Ohio St. L. J. 551 (1969). While that note does make the case that Ohio common law is virtually indistinguishable from Restatement 402A, it does not address the state of the law from the point of view of the non-manufacturer supplier. At the time of the Journal's publication, *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 277, was the paramount Ohio decision in the law of products liability. However, while *Lonzrick* established the doctrine of strict liability in Ohio, that holding was never used, to the best of our knowledge, to impose strict liability upon a non-manufacturer supplier. Thus, the state of Ohio common law after the *Lonzrick* decision differed substantially from the

(Continued on following page)

and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area." *Temple*, 50 Ohio St. 2d at 322. Thus, it would appear that the primary goal of the Ohio Supreme Court in adopting the Restatement was merely to add structure and substance to the body of law in Ohio regarding strict liability in tort. We believe that this goal is neither promoted nor hampered by retroactively applying the holding in *Temple*.

In examining whether the retrospective application of *Temple* will produce substantial inequitable results, we answer affirmatively. Prior to 1977, a supplier of asbestos-containing products would have no reason to believe that it would be subject to liability for injuries suffered by end users so long as that supplier used reasonable care to prevent such injuries. To hold those suppliers strictly liable today for selling asbestos-containing products decades before the *Temple* decision was handed down would be manifestly unjust. As pointed out in the Joint Amicus Brief in Support of Defendants' Motions for Summary Judgment, the purpose of the strict liability doctrine is to induce manufacturers and suppliers to do everything possible to reduce the risk of injury and to insure against what risk remains. Obviously, imposing strict liability retroactively cannot induce anyone

state of the law after the *Temple* decision, particularly from the non-manufacturer supplier's standpoint.

to do anything: opportunities to mitigate the risk have long since passed. Moreover, this Court believes that suppliers would have had no reason to anticipate prior to 1977 the liability that they faced today. Therefore, this Court sees no just reason to hold non-manufacturer suppliers strictly liable for sales of asbestos-containing products that occurred before the Supreme Court issued its opinion in *Temple v. Wean*.

For the foregoing reasons, we find that an exception must be made to the general rule of retrospective application of Ohio Supreme Court decisions. To do otherwise would produce substantial inequitable results and advance no valid public policy. Therefore, the new legal standard adopted by the Ohio Supreme Court in *Temple v. Wean* – that contained in Section 402A of the Restatement – can only be applied in those cases where the cause of action arose after the issuance of that opinion.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

May 9, 2006

**IN THE COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY, OHIO
ASBESTOS LITIGATION -
ELECTRONIC FILING**

IN RE: GOLDBERG) Case No. 00-404588
GROUP 24	) Case No. 03-514986
GENEVIEVE DICENZO,	) JUDGES
Executrix of the Estate	) HANNA/SPELLACY
of JOSEPH DICENZO,	) JUSTICE SWEENEY
Deceased and GENEVIEVE)
DICENZO, in her own right)
Plaintiff,)
vs.)
A-BEST PRODUCTS)
COMPANY, INC., et al.,)
Defendants.	

**FINAL ORDER DISPOSING OF
ALL CLAIMS AGAINST ALL PARTIES**

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**FINAL ORDER DISPOSING OF ALL
CLAIMS AGAINST ALL PARTIES**

IT IS HEREBY ORDERED that the following
Motions for Summary Judgment in the above-
captioned action are **GRANTED**:

- Motions for Summary Judgment filed on behalf
of Borg-Warner Corporation
- Motions for Summary Judgment as to the
Strict Liability and Negligence Claims filed on
behalf of George V. Hamilton, Inc.
- Motion for Summary Judgment as to Plaintiff's
Wrongful Death Claim

IT IS FURTHER ORDERED that this case shall
be dismissed for the reason that all claims by and
against all other parties before the Court and over
whom the Court has jurisdiction in this action have
been disposed of or determined.

IT IS ORDERED that, all claims having been
disposed of, this is the final Order of the Court.

App. 66

DATED: 7/19/06

BY THE COURT:

/s/ Leo M. Spellacy

IN THE SUPREME COURT OF OHIO

GENEVIEVE DICENZO,	:	Case No. 2007-1628
Executrix of the Estate	:	
of JOSEPH DICENZO,	:	On Appeal from the
Deceased, and	:	Cuyahoga County
GENEVIVE DICENZO,	:	Court of Appeals,
in her own right,	:	Eighth Appellate
	:	District,
Appellee,	:	
	:	Court of Appeals
v.	:	Case No. 06-088583
A-BEST PRODUCTS	:	
COMPANY, INC., et al.,	:	
	:	
Appellants.	:	

MERIT BRIEF OF
APPELLEE GENEVIEVE DICENZO

* * *

B. The Retroactive Application of Strict Liability is an Imperative Because It has been Retroactively Applied.

Proper development of a common law system based on precedent requires that new legal rules, once applied retroactively to the parties before the adopting court, must be given retroactive application to all cases not completely resolved. In the usual case, the very nature of litigation assures that the conduct at issue predates the adoption of the rule governing the legal effect of that conduct. Consequently, as the Supreme Court of the United States has observed,

[W]e can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'

Harper v. Virginia Dept. of Taxation (1993), 509 U.S. 86, 97-98, 113 S.Ct. 2510 (citations omitted). Stability and fairness in the judicial system require that exceptions are not made based on a particular litigant's circumstances. Indeed, G.V. Hamilton's supply of asbestos-containing products prior to this Court's adoption of § 402A in 1977 should not change "the fundamental rule of 'retrospective operation' that has governed "[j]udicial decisions . . . for near a thousand years.'" *Harper*, 509 U.S. at 94 (citations omitted).

Three days prior to the Court of Appeals' decision in the instant action, on June 25, 2007, the Court of Appeals of Washington in *Lunsford v. Saberhagen* (Wash.App. Div. 1 2007), 160 P.3d 1089, addressed the retroactive application of strict liability for injuries arising from asbestos exposure occurring prior to the adoption of Restatement (Second) of Torts § 402A. In holding that strict liability should be applied retroactively, the Court found that the issue of retroactivity was already resolved because strict liability had already been applied in cases involving asbestos exposure occurring before the adoption of strict

liability. *Lunsford*, 160 P.3d at 1094. The Court quoted the Supreme Court of the United States in *James B. Beam Distilling Co. v. Georgia* (1991), 501 U.S. 529, 111 S.Ct. 2439:

'Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.' Once rung, the bell is not unrung.

Lunsford, 160 P.3d at 1093 (quoting *James B. Beam Distilling*, 501 U.S. at 543). The principle recognized in *Beam* and *Lunsford* court is fully applicable to the instant action because strict liability has already been applied retroactively by this Court. In nearly every case, a newly adopted rule will apply to the parties before the court. Thus, the new rule has retroactive effect and remaining consistent in a rule's application is essential to avoid disparate results and serious equal protection concerns. See, e.g., *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338 ("a legal system based on precedent has a built-in presumption of retroactivity."). In *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 218 N.E.2d 185, this Court adopted strict liability and applied it to the parties before it. Appellee submits that the same policy analysis that led this Court to apply strict

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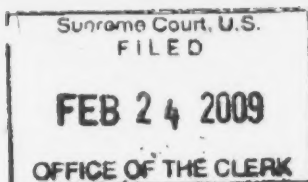
liability retroactively to a manufacturer is equally applicable to the consideration of the retroactive application of strict liability to a non-manufacturing seller.

* * *

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(2)

No. 08-932



**In The
Supreme Court of the United States**

GENEVIEVE DICENZO, EXECUTRIX OF THE ESTATE OF
JOSEPH DICENZO, AND GENEVIEVE DICENZO, IN HER OWN RIGHT,
Petitioner,

v.

GEORGE V. HAMILTON, INC.,
Respondent.

*On Petition for Writ of Certiorari
to the Supreme Court of Ohio*

BRIEF IN OPPOSITION

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February 24, 2009

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

Since 1984, Ohio has had in place statutes that severely limit the strict liability of non-manufacturer sellers of defective products to certain discrete situations, such as when the manufacturer of the defective product is not subject to judicial process in Ohio. These statutes were enacted explicitly to preclude the imposition of strict liability on suppliers and sellers of defective products except in those discrete instances. In an attempt to avoid these statutes, petitioner has been seeking in the instant lawsuit to impose strict liability on non-manufacturer sellers of asbestos products with respect to sales made **prior to 1977**, when the Supreme Court of Ohio, in the case of *Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977), adopted Section 402A of the Restatement (Second) of Torts. The thrust of petitioner's argument has been that the "rule" adopted in the *Temple* case, imposing strict liability on non-manufacturer sellers (as well as on manufacturers), should be applied to sales of asbestos products that occurred prior to 1977.

The trial court and the Ohio Supreme Court, however, rejected petitioner's attempt to impose strict liability on non-manufacturer suppliers with respect to pre-1977 sales. Applying the three-factor test prescribed by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), those Ohio courts held, first, that the *Temple* case had established a new principle of law with respect to non-manufacturer sellers "that was not clearly foreshadowed" by prior decisions of the Ohio courts and, second, that imposing "such a potential financial burden on these non-manufacturing suppliers

years after the fact for an obligation that was not foreseeable at the time would result in a great inequity." (App. 27-28 to Petition.) Accordingly, since these findings met the *Chevron Oil* criteria, the Ohio courts held that the *Temple* decision should not be given retroactive effect.

Petitioner is now asking this Court to negate that holding (and the numerous other state supreme court decisions that have similarly adopted and approved the *Chevron Oil* three-part test) by announcing a rule that a state supreme court violates the equal protection clause of the Fourteenth Amendment of the United States Constitution whenever it holds that a particular pronouncement of state law should be limited to a prospective-only application.

As the following discussion demonstrates, such a rule would be contrary to public policy. In addition, there are several procedural and legal reasons why Petitioner's petition for writ of certiorari should be denied.

I. CERTIORARI MUST BE DENIED BECAUSE NO FEDERAL ISSUE WAS PRESENTED OR DECIDED BELOW.

Certiorari should be denied in this case because the only federal issue Petitioner alleges in her petition (infringement of the equal protection clause of the Fourteenth Amendment of the United States Constitution) was never raised by Petitioner in, let alone considered or decided by, any of the courts below.

This Court has consistently held that it “will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.” *Adams v. Robertson*, 520 U.S. 83 (1997). See also *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (“The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions”); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981) (the Supreme Court will review a final judgment of a state supreme court “only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system”); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Holly Farms Corp. v. Labor Bd.*, 517 U.S. 392, 392 n.7 (1996); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This policy is designed to allow state courts the first opportunity to consider a state law issue in light of federal constitutional arguments (*Cardinale*, 394 U.S. at 439), as well as to ensure that this Court has the benefit of a full and complete record upon which to weigh and decide a federal constitutional issue.

Accordingly, where, as here, a decision of a state’s highest court is silent as to the federal question upon which the petitioner seeks to obtain certiorari, “it will be assumed that the omission was due to want of proper presentation in the state court unless the aggrieved party in this Court can **affirmatively** show the contrary.” *Exxon Corp.*, 462 U.S. at 181 n.3 (quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969))) (emphasis added). See also *Bd. of Dir. of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)

(holding that where petitioners “did not present the [federal constitutional] issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal[s]” they “have made no such showing” that the issue was presented below); and *Street v. New York*, 394 U.S. 576, 582 (1969) (“If the [federal constitutional] question was not so presented, then we have no power to consider it [. . .] unless the [petitioner] . . . can affirmatively show the contrary”)

In the instant case, Petitioner DiCenzo cannot satisfy this burden because she failed to raise or present an equal protection argument in any of the courts below. Petitioner’s only resort is to quote (at page 5 of her Petition) a single passing and oblique reference to possible “equal protection concerns” that was essentially buried in the Merit Brief that she filed in the Ohio Supreme Court, to wit: “In nearly every case, a newly adopted rule will apply to the parties before the court. Thus, the new rule has retroactive effect and remaining consistent in a rule’s application is essential to avoid disparate results and serious equal protection concerns.” The quoted sentence is the sole reference in any of Petitioner’s briefs in the Ohio courts to “equal protection.” Clearly, that solitary reference does not amount to the required standard of “presentment” and thus affords no basis for this Court to grant certiorari, especially since Petitioner did not present *any* equal protection *argument* in any of the courts below.

Moreover, even if it were assumed, *arguendo*, that the single reference quoted by Petitioner did raise an “argument” as to equal protection, there is no reason to believe that it raised a *federal constitutional* argument, as distinguished from a state constitutional

argument. In *Webb v. Webb*, 451 U.S. 493 (1981), this Court held that the petitioner's passing use of the phrase "full faith and credit" clause in her briefs in the state appellate courts did not give rise to a federal issue, since "nowhere did she cite to the Federal Constitution or to any cases relying on the *Full Faith and Credit Clause of the Federal Constitution*." 451 U.S. at 497 (emphasis original). Moreover, nowhere in the opinion of the state court from which the petitioner sought certiorari was "any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court." *Id.*, 451 U.S. at 495. Thus, *Webb* is directly on point with the present case, since no mention of any federal equal protection clause was made in the briefs filed with, or in the majority and dissenting opinions of, the Ohio Supreme Court. *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988), holding that a mere "generic reference to the Fourteenth Amendment" in the state court "is not sufficient to preserve a constitutional claim."

II. THE DECISION OF THE OHIO SUPREME COURT FOLLOWED, AND IS IN ACCORD WITH, SEVERAL LONG-STANDING DECISIONS OF THIS COURT.

As far back as 1932, starting with the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), this Court has held that state supreme courts have the right to determine whether their decisions would be applied retroactively or prospectively only. This Court stated in *Sunburst*: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It

may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions." *Id.* at 364.

In 1971, this Court expanded on the *Sunburst* decision by developing a test that courts, both state and federal, could use in determining when cases should not be given retroactive effect. In *Chevron Oil Co. v. Huson*, this Court held:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of retroactivity."

404 U.S. at 106-107 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)) (citing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)).

In 1993 however, a majority of this Court adopted a different rule with respect to decisions made by this

Court when interpreting federal law. The majority held: "When this Court applies a rule of **federal law** to the parties before it, that rule is the controlling interpretation of **federal law** and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added).

In so holding, the *Harper* court continued to recognize the viability of *Sunburst* insofar as decisions of state high courts adjudicating issues of state law are concerned. Thus, citing *Sunburst*, the majority opinion stated that "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law." *Id.* at 100. Since 1993, state supreme courts have taken this Court at its word. An overwhelming majority of those courts have held, as the Ohio Supreme Court did in the instant case, that "this language indicates that *Harper's* limitation of *Chevron Oil* applies to federal law only." *DiCenzo v. A-Best Prods. Co., Inc.* 897 N.E.2d 132, 139 (Ohio 2008).

Sunburst further declared that the "choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origins and nature." 287 U.S. 358, 365. State supreme courts have therefore adhered to this approach. See, e.g., *Findley v. Findley*, 629 S.E.2d 222, 227-228 (Ga. 2006), where the Georgia Supreme Court stated that "[b]oth prior to and following the entry of the three-pronged *Chevron Oil* test into this Court's jurisprudence in *Flewellen [v. Atlanta Casualty Co.,*

300 S.E.2d 673 (Ga. 1983)], this Court expressed a juristic philosophy that recognizes there are compelling exceptions to the general rule that judicial decisions apply retroactively." The Georgia Supreme Court then concluded that "the juristic philosophy of this State is more consistent with that expressed in *Chevron Oil* than that of *James B. Beam Distilling and Harper*." *Findley*, 629 S.E.2d at 228.

To the same effect is *Beavers v. Johnson Controls World Services, Inc.* 881 P.2d 1376, 1381 (N.M. 1994), where the Supreme Court of New Mexico concluded that the "jurisprudence of this state...is more nearly consistent with the views of the *Harper* minority that voted to retain *Chevron Oil* than with those of the majority that decided to cast it aside." What the New Mexico Court was here referring to was the view of dissenting Justices O'Connor and Rehnquist, who vigorously disagreed with the majority holding that all decisions of this Court interpreting federal law should be given retrospective effect. Justice O'Connor stated: "But even if one believes the prohibition on selective prospectivity desirable, it seems to me that the Court today takes that judgment to an illogical – and inequitable – extreme...Such a rule is both contrary to established precedent and at odds with any notion of fairness or sound decisional practice." *Harper*, 509 U.S. at 117.

The overwhelming majority of state courts are in accord with the latter view. While most state courts have recognized that there is a presumption of retroactivity, they also recognize that there can be exceptions. See, e.g., *Montells v. Haynes*, 627 A.2d 654, 660 (N.J. 1993) ("Prospective application is appropriate when a decision establishes a new

principle of law by overruling past precedent or by deciding an issue of first impression"); *Aleckson v. Village of Round Lake*, 679 N.E.2d 1224, 1228 (Ill. 1997) ("all reviewing courts have the power to exercise discretion in a just manner so as to do equity, factors which, as we have already noted, play a great role in considering whether to apply a previous decision prospectively"); *In re Commitment of Thiel*, 241 Wis. 2d 439, 449 (2001) ("an appellate court may employ the technique of prospective application – 'sunbursting' – to mitigate hardships that may arise with the retroactive application of a new rule of law"); *General Motors Corp. v. New Castle County*, 701 A.2d 819, 822 (Del. 1997) ("a court should deny retroactive application 'only where on balance the weight of the three *Chevron* factors favor prospective application'"); and *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483 (Mont. 2004) (stating that it would apply a decision prospectively when all three *Chevron Oil* factors are met).

In the instant case, the Ohio Supreme Court followed this line of cases. In so doing, that Court relied on the holding of this Court in *Sunburst* and determined that "the *Chevron Oil* test is . . . consistent with Ohio law in addressing retroactive/prospective application of court decisions." *DiCenzo*, 897 N.E.2d at 138.

It should be further noted that, contrary to what Petitioner implies, the *Harper* case (on which Petitioner so heavily relies) made no mention of the equal protection clause in arriving at its holding that a decision of this Court interpreting federal law shall always be applied retrospectively. Indeed, as Petitioner herself acknowledges, state supreme courts

have consistently concluded that "*Harper* does not have constitutional significance and thus is not binding on their decisions regarding the retroactivity of new state rules announced in judicial decisions." (Petition, p. 8.) Therefore, lacking any specific language in the *Harper* decision that supports its equal protection argument, petitioner's only recourse is to suggest that *Harper* "evoked **considerations** of equal protection." (Petition, p. 7.) This Court should not grant certiorari on the basis of such tenuous "evocations."

Finally, the rule of law that Petitioner would have this Court adopt under the guise of "equal protection" would be bad public policy. Petitioner would have this Court hold that every new rule of law adopted by a state supreme court must be given retroactive effect, regardless of the circumstances. Indeed, under such a doctrine, a state supreme court could no longer specifically state, when issuing a decision, that the decision is not to be applied retroactively, since such a statement would violate the equal protection clause. State supreme courts would thus be precluded from holding, as the Ohio Supreme Court did in the instant case, that while "prospective-only application is justified only under exceptional circumstances," such justification occurs in a case that presents "the extraordinary circumstances that satisfy the *Chevron Oil* test." (App. 20 to Petition.)

III. THE RULE URGED BY PETITIONER IS NOT APPLICABLE TO THE FACTS OF THE INSTANT CASE.

A third reason why the petition should be denied is that the facts of this case do not meet the factual pre-

conditions of the rule that Petitioner is asking this Court to adopt. Petitioner urges this Court to impose on state courts the same rule with respect to retroactivity that the *Harper* case imposed on federal courts when interpreting federal law. If that were done, the new rule would read: "When [the highest court of the state] applies a rule of [] law to the parties before it, that rule must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or post-date [the state court's] announcement of the rule." *Harper*, 509 U.S. at 97.

However, the instant case could not serve as the basis for the adoption of such a rule since the Ohio Supreme Court decision that was the subject of this action, *Temple v. Wean United, Inc.*, was **not** a case in which the rule of law announced therein was actually "applie[d] to the parties before" the court in that case.

In other words, although the Ohio Supreme Court in *Temple* "adopted" Section 402A of the Restatement (Second) of Torts, the Supreme Court did not apply the portion of that Restatement rule relating to non-manufacturer sellers to any of the parties before it. In fact, the Ohio Supreme Court in *Temple* did not even impose Section 402A strict liability on the defendant manufacturer. Rather, the Supreme Court agreed with the lower courts that the punch press manufactured by defendant Wean United was not defective and that Temple's injury had actually resulted from modifications that had been made to the press by Temple's employer. The Supreme Court therefore affirmed the summary judgment that had been entered by the Common Pleas Court in favor of the defendants. Accordingly, since the new rule

“approved” in *Temple* was not “applie[d] to the parties before” the Ohio Supreme Court in that case, that new rule would not be retroactive even if the *Harper* “rule” were expanded to embrace decisions of state law announced by state supreme courts.

The fact that the *Temple* decision did not apply the new rule of strict liability (insofar as it embraced non-manufacturer sellers) to any of the parties before the Ohio Supreme Court in that case also means, of course, that the refusal of the Ohio Supreme Court in the instant case to apply *Temple* retroactively does not give rise to any “equal protection concerns.” According to Petitioner’s argument, such a concern arises when a state court applies “a new rule of state law to the litigants before them [sic] but not to other cases where the conduct to be considered occurred prior to the adoption of the new rule.” (Petition, pp. 8-9.) Since, however, *Temple* was not a case in which the “new rule” was applied to the litigants before the court, it follows that not applying that rule to other litigants (like the petitioner in the instant case) does not deprive those litigants of the same “protection” that was given the litigant in *Temple*, because the *Temple* case actually gave plaintiff Temple no protection at all.

IV. EVEN IF CERTIORARI WERE GRANTED, PETITIONER COULD NOT PREVAIL ON THE MERITS.

Should Petitioner overcome the many procedural barriers outlined above, her claim would nonetheless fail if subjected to an equal protection analysis, because the state action at issue is rationally related to a legitimate governmental purpose.

There are three levels of review under this Court's equal protection jurisprudence, the most stringent being strict scrutiny. This level of review applies to classifications based upon race, national origin, and alien status (*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, (1986)), or to statutes that implicate fundamental rights (*United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). Intermediate scrutiny applies to classifications based upon sex or the marital status of a child's parents. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications, including the "class" of which Petitioner claims she is a member, are subject to rational basis review. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

"[O]ne who assails the classification...must carry the burden of showing that it does not rest upon a reasonable basis, but is essentially arbitrary," *Bringard v. Caruso*, 2008 U.S. Dist. LEXIS 31672, 10 (W.D. Mich. 2008) (citing *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)), and that the state action at issue is illogical and unrelated to "any legitimate government purpose" *Bringard*, 2008 U.S. Dist. LEXIS, 31672, 10. Accordingly, should this Court grant the instant petition for writ of certiorari, rational basis review would be the applicable standard, and Petitioner would have the burden of showing that the *DiCenzo* decision is arbitrary, illogical and unrelated to any legitimate government purpose.

Petitioner cannot meet this heavy burden. As the Ohio Supreme Court stated in *DiCenzo*, the State of Ohio has a legitimate interest in determining when, and how, to apply its laws prospectively. Petitioner cannot credibly claim otherwise.

In a case factually similar to the case at bar, a Missouri Court of Appeals held that equal protection concerns are not implicated by prospective application of state laws. In that case, *Phuong Nguyen v. Tien V. Nguyen*, 882 S.W.2d 176 (Mo. Ct. App. 1994), the petitioner challenged the Missouri Supreme Court's conclusion that a certain law should have prospective application only. The petitioner claimed that such prospective treatment unreasonably precluded his ability to bring a cause of action under that law, and thereby violated "his equal protection rights under the Fourteenth Amendment of the United States Constitution..." *Id.* at 177. However, the Missouri Court of Appeals applied a federal equal protection analysis and held that the decision to apply a law prospectively-only was "reasonable, justified, and rationally related to a legitimate state interest." *Id.* at 179.

Therefore, even if Petitioner is able to overcome the numerous procedural obstacles outlined above, she would be unsuccessful in proving the substance of her claim, as the state action involved in this case simply does not implicate the equal protection clause of the Fourteenth Amendment.

V. CONCLUSION.

Certiorari should be denied because no federal issue was preserved for this Court to review; this Court has held, since 1932, that it is for the states to decide whether and when to apply their decisions prospectively only; *Harper* is not applicable to this case; Petitioner could not prevail on the merits; and the rule that Petitioner seeks would be bad public policy.

Respectfully Submitted,

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